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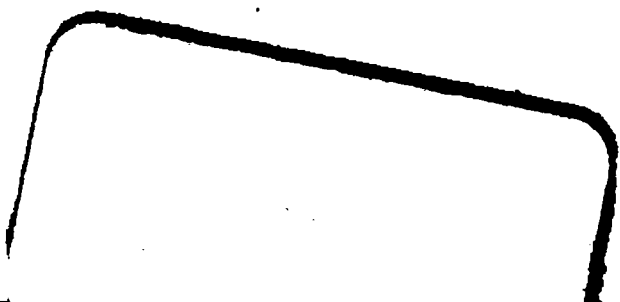
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# The Law Magazine.

OR

## QUARTERLY REVIEW

OF

## Jurisprudence.

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*FEBRUARY—MAY, 1851.*

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THE  
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ART. I.—THE NEW CODE OF PROCEDURE OF  
NEW YORK.

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THE cry for law reform has for some years been loudly heard in this country. A preference of technical to rational principles, and a subtlety rendered by long practice excessive, together with a desire to adhere to fixed rules, and a strong jealousy of judicial discretion, are charged against our jurisprudential system; and it is said that they have conspired to render our law what it now is, and that the result has been to multiply abuses, to create and perpetuate useless forms, to pile up a mass of reports, the contents of which no human being can master; to add judgment upon judgment, too often conflicting and decided upon precedent rather than principle, and in the end to compel not only the public but the profession to look with anxiety for any safe mode of extricating themselves from the labyrinth in which they are involved.

Many attempts have been made to do so, but none on a principle sufficiently judicious to insure or deserve success.

The common-law courts first yielded to this very general feeling, and subsequently, but with less grace and more difficulty, the courts of equity. In the year 1832, an attempt was made to reform special pleading, and some good would have been done by the New Rules, had full effect been given to them, and the intention with which they were framed fully carried out. A further reform in that branch of law is, however, still loudly demanded, and we cannot say without reason.

The establishment of county courts, and the extension of their jurisdiction, has, as far as they go, introduced a sweeping change in pleading, practice, and evidence. Still the public are not satisfied, but turn their longing eyes to other countries, institute comparisons not always to our advantage, and urge (and it

must be confessed with some reason) that what has been found practicable elsewhere may be made so here.

Most opportunely, therefore, while all people are agreed that reform is needed (the only question being how far it can with safety and advantage be carried), and while the new Common Law Commission are issuing suggestions, halting and faltering, willing, perhaps, but unable, to free their minds from that peculiar tone which long and successful practice under our present system inevitably induces; while, too, some have been found to advocate our going over to Rome (in the present day rather a taking idea), there to find by means of a "Prætor" relief for our manifold legal miseries, and a cloud of pamphlets have appeared, each advocating some changes and exposing some abuses,—a practical people in the western hemisphere have appointed a commission, and quietly, expeditiously and cheaply (wishing, probably, to shame our Criminal Law Commissioners, who have passed fifteen years, spent thousands, and published reports without end and without result), and out of laws similar to our own and derived from us, have created a simple, single, and intelligible judicial system, which has hitherto worked well in the state (New York) by which it was first sanctioned, and has in consequence been adopted by several other states of the American Union.

This new system was explained at a meeting of the Law Amendment Society, on Monday, the 17th of November, by Mr. Field, one of the commissioners who prepared the Code above alluded to, and we now propose to introduce to our readers some of the leading provisions of this Code, which has made such radical changes in the old law, and which is said to answer fully and well every requirement of a practically intelligent and eminently commercial people. And here we must quote an admirable passage of Hallam (Mid. Ages), which, it appears to us, the New York commissioners have fully carried out :

"Let us not be deterred by a clamour against innovation from abrogating what is useless, simplifying the complex, or determining what is doubtful, nor attempt to stave off an immediate pressing difficulty by a patch-work scheme of modifications and suspensions, but let us consult for posterity in a comprehensive spirit of legal philosophy."

The instructions the commissioners received were indeed precise, and left them no room, had they desired it, to narrow their scope. They were to attend to the terms of the act under which they were appointed, which enjoined upon them as a duty,

1st. To provide for the abolition of the forms of action and pleading.

2ndly. To make the course of proceeding uniform in all cases, whether of legal or equitable cognizance.

3rdly. To abolish all forms and proceedings not necessary to ascertain or preserve the right of the parties.—A legal scheme of unparalleled boldness, being in fact an entire revolution in their law, and which could not be carried out without going to the very roots of the old procedure, without a new growth from the very beginning. A more difficult or important task has rarely been undertaken, and it would hardly have been matter of surprise if the commissioners had refused to grapple with it; they however probably felt with Ausonius, that modesty forbade them to plead inability for a task to which Cæsar had thought them equal.

“Cur me posse negem, posse quod ille putat.”

At the meeting before alluded to, Mr. Field began by informing his hearers that the courts of law in the State of New York were, previously to the new Code, modelled on those of Great Britain; that they, like us, had a chancellor and vice-chancellor, whose jurisdiction was the same as in England; also, a supreme court of common law, like the Queen's Bench, and a court of appeal, answering to our House of Lords. When an appeal came from the Court of Chancery, the judges of the Supreme Court sat with the senate; when the appeal came from the Supreme Court, the judges of the Supreme Court sat in the senate. Thus they had two systems, one of common law, the other of equity, and suitors were bandied about between both until patience and purse were alike exhausted. They had also, like ourselves, different forms of actions at common law, which added to the difficulty and uncertainty of obtaining justice.

Feeling that this state of things was unnecessary and hard to be borne, a commission consisting of three persons was appointed in 1847; their first report was published and laid before the legislature in February, 1848, and on the 30th of December, 1849, the whole Code, both civil and criminal, was published, and became in the next session, with slight modifications, the law of the land. Let us pause here for a moment to pay a just tribute of admiration to men who accomplished, and it would hitherto appear with entire success, so great a labour in so short a time.

Having thus alluded to the previous state of the law, the appointment of the commission, and the instructions they received, Mr. Field proceeded to explain the changes effected by

the new Code; and we will now endeavour to introduce them to our readers as clearly as our limited space will allow, confining ourselves, in this article, to the Civil Code alone, recommending earnestly a study of the Code itself, which is in most parts very clearly and ably drawn up.

The act is entitled "An Act to simplify and abridge the Practice, Pleadings and Proceedings of the Courts of this State."

The preamble states, "That whereas it is expedient that the present forms of actions and pleadings in cases at common law should be abolished; that the distinction between legal and equitable remedies should no longer continue, and that an uniform course of proceeding in all cases should be established;" Therefore,

"The people of the State of New York, represented in senate and assembly, do enact as follows:—"

1st. Remedies in courts of justice are divided into

1. Actions.
2. Special proceedings.

An action is defined to be "an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence."

3rdly. Every other remedy is a special proceeding.

4thly. Actions are stated to be of two kinds,

1. Civil.
2. Criminal.

And a criminal action is prosecuted by the people of the State, as a party, against a person charged with a public offence, for the punishment thereof.

Every other is a civil action; and where the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other.

The act is divided into two parts. The first relates to the courts of justice and their jurisdiction, which we pass by as uninteresting to our readers. The second part relates to civil actions, and is distributed into fifteen titles.

The first of these titles is devoted to the forms of civil actions, and enacts,—

S. 69, "That the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this State hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action."

S. 70, "in such action the party complaining shall be known as the plaintiff, and the adverse party as the defendant."

And by s. 72, feigned issues are abolished, and instead thereof, in the cases where the power now exists to order feigned issues, or where a question of fact not put in issue by the pleadings is to be tried by a jury, an order for the trial may be made, stating distinctly and plainly the question of fact to be tried, and such order shall be the only authority necessary for a trial.

These sections, and those which follow, being peculiarly important, we have given them verbatim. The act next provides for the time within which actions must be commenced, and passes thence to the third title, "Parties to Civil Actions." It will be seen that, by the sections we have given above, the act abolishes the Court of Chancery as distinct from the Courts of Common Law, and creates one supreme tribunal to administer all the law of the land, whether at law or equity,—thus fulfilling the first part of the instructions given to the commissioners.

By s. 111, the act enacts that—

"Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in s. 113.

"S. 112. In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defence existing at the time of or before notice of the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith and upon good consideration, before due.

"S. 113. An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the suit is prosecuted.

"S. 114. When a married woman is a party, her husband may be joined with her, except that—

"1. When the action concerns her separate property, she may sue alone.

"2. When the action is between herself and her husband, she may sue or be sued alone.

"S. 115. When an infant is a party, he must appear by guardian, who may be appointed by the court in which the action is prosecuted, by a judge thereof, or a county judge.

"S. 116. The guardian shall be appointed as follows:

"1. When the infant is plaintiff, upon the petition of the infant, if he be of the age of fourteen years, or if under that age, upon the petition of some other party to the suit, or of a relative or friend of the infant.

"2. When the infant is defendant, upon petition of the infant, if he be of the age of fourteen years, and apply within twenty days after service of the summons. If he be under the age of fourteen years, or neglect to apply, then upon the petition of

any other party to the action, or of a relative or friend of the infant.

“S. 117. All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, except as otherwise provided in this title.

“S. 118. Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination and settlement of the questions involved therein.

“S. 119. Of the parties to the action those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as a plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

“S. 120. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all or any of them be included in the same action, at the option of the plaintiff.

“S. 121. No action shall abate by the death, marriage or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death, marriage or other disability of a party, the court, on motion at any time within one year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued by or against his representatives or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action.

“S. 122. The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court shall order them to be brought in.”

We consider these sections clearly drawn, and calculated to meet any case; but as we have before said, we had rather that our readers should on that point be able to judge for themselves, and have therefore given them un mutilated.

The 4th and 5th titles treat of the place of trial of civil actions and the mode of commencing them. By s. 127, it is enacted, that “Civil actions in the courts of record of this State shall be commenced by the service of a summons;” then follow numerous sections relating to the contents of the summons, and in what cases the service must be personal and when not, as in the case of corporations, infants, persons of unsound mind, &c.; where

there are several defendants and part only served; publication when defendant cannot be found, &c.; and in the sixth title we come to the all-important subject of the pleadings, and in this case also we shall give them entire, as to abridge them truthfully is nearly impossible. A more striking contrast to our standard works on special pleading than these plain common sense rules present, it is impossible to imagine. The commissioners have gone to work with no niggardly hand, and have offered up on one funereal pyre, to the goddess of Reason, the laborious work of men who for centuries taxed their minds for the purpose of smothering all that was valuable in a system which, in the words of Lord Mansfield, "is founded in strong sense and the closest logic," which in its elements is almost faultless, but which has yet been refined upon, tortured and twisted until justice and sound legal principles are alike buried under a chaotic heap of quibbles and conflicting decisions. We will, however, as before, let the act speak for itself. The title is divided into six chapters relating to the—

1. **Plaint.**
2. **Demurrers.**
3. **Answer.**
4. **Reply.**
5. **General Rules of Pleading.**
6. **Mistakes in Pleading and Amendments.**

"S. 140. All the forms of pleading heretofore existing inconsistent with the provisions of this act are abolished; and hereafter, the forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of the pleadings is to be determined, are modified as prescribed by this act.

"S. 141. The first pleading on the part of the plaintiff is the complaint.

"S. 142. The complaint shall contain:

"1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the plaintiff desires the trial to be had, and the names of the parties to the action, plaintiff and defendant.

"2. A statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.

"3. A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated.

"S. 143. The only pleading on the part of the defendant, is either a demurrer or an answer. It must be served within twenty days after the service of the copy of the complaint.



“ S. 144. The defendant may demur to the complaint, when it shall appear upon the face thereof, either—

“ 1. That the court has no jurisdiction of the person of the defendant or the subject of the action; or,

“ 2. That the plaintiff has not legal capacity to sue; or,

“ 3. That there is another action pending between the same parties for the same cause; or,

“ 4. That there is a defect of parties, plaintiff or defendant; or,

“ 5. That several causes of action have been improperly united; or,

“ 6. That the complaint does not state facts sufficient to constitute a cause of action.

“ S. 145. The demurrer shall distinctly specify the grounds of objection to the complaint. Unless it do so, it may be disregarded. It may be taken to the whole complaint, or to any of the alleged causes of action stated therein.

“ S. 146. If the complaint be amended, a copy thereof must be served on the defendant, who must answer it within twenty days, or the plaintiff, upon filing with the clerk proof of the service, and of the defendant's omission, may proceed to obtain judgment, as provided by s. 246; but where an application to the court for judgment is necessary, eight days' notice thereof must be given to the defendant.

“ S. 147. When any of the matters enumerated in s. 144 do not appear upon the face of the complaint, the objection may be taken by answer.

“ S. 148. If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court and the objection that the complaint does not state facts sufficient to constitute a cause of action.

“ S. 149. The answer of the defendant shall contain,—

“ 1. In respect to each allegation of the complaint controverted by the defendant, a general or specific denial thereof, or a denial thereof according to his information and belief, or of any knowledge thereof sufficient to form a belief.

“ 2. A statement of any new matter constituting a defence, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.

“ S. 150. The defendant may set forth, by answer, as many defences as he shall have. They shall each be separately stated, and refer to the causes of action which they are intended to answer in any manner by which they may be intelligibly distinguished.

“ S. 151. The defendant may demur to one or more of several causes of action stated in the complaint, and answer the residue.

“ S. 152. Sham answers and defences may be stricken out on motion.

“ S. 153. When the answer shall contain new matter, the plaintiff may, within twenty days, reply to it, denying generally or particu-

larly each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended, any new matter not inconsistent with the complaint, in avoidance of the answer; or of any defence set up therein; or he may demur to the same for insufficiency, stating in his demurrer the grounds thereof. And the plaintiff may demur to one or more of several defences set up in the answer and reply to the residue.

“ S. 154. If the answer contain a statement of new matter constituting a defence, and the plaintiff fail to reply or demur thereto within the time prescribed by law, the defendant may move on a notice of not less than ten days for such judgment as he is entitled to upon such statement, and, if the case require it, a writ of inquiry of damages may be issued.

“ S. 155. If a reply of the plaintiff to any defence set up by the answer of the defendant be insufficient, the defendant may demur thereto, and shall state the grounds thereof.

“ S. 156. No other pleading shall be allowed than the complaint, answer, reply and demurrers.

“ S. 157. Every pleading in a court of record must be subscribed by the party or his attorney, and when any pleading in a case shall be verified by affidavit, all subsequent pleadings, except demurrers, shall be verified also; and in all cases of the verification of a pleading, the affidavit of the party shall state that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true. And where a pleading is verified, it shall be by the affidavit of the party, unless he be absent from the county where the attorney resides, or, from some cause, unable to verify it, or the facts are within the knowledge of his attorney, or other person verifying the same. When the pleading is verified by the attorney, or any other person except the party, he shall set forth, in the affidavit, his knowledge, or the grounds of his belief, on the subject, and the reasons why it is not made by the party. When a corporation is a party, the verification may be made by any officer thereof; and when the State, or any officer thereof in its behalf, is a party, the verification may be made by any person acquainted with the facts, except that, in actions prosecuted by the Attorney-General, in behalf of the State for the recovery of real property, the pleadings need not be verified.

“ S. 158. It shall not be necessary for a party to set forth, in a pleading, the items of an account therein alleged; but he shall deliver to the adverse party, within ten days, after a demand thereof in writing, a copy of the account verified by his own oath, or that of his agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The court, or a judge thereof, or a county judge, may order a further or more particular bill.

“ S. 159. In the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties.

“ S. 160. If irrelevant or redundant matter be inserted in a pleading, it may be stricken out, on motion of any person aggrieved thereby. And when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain, by amendment.

“ S. 161. In pleading a judgment, or other determination of a court, or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction; but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish, on the trial, the facts conferring jurisdiction.

“ S. 162. In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts, showing such performance; but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading shall be bound to establish on the trial the facts showing such performance.

“ S. 163. In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute, by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

“ S. 164. In an action for libel or slander, it shall not be necessary to state in the complaint any extrinsic facts, for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state, generally, that the same was published or spoken concerning the plaintiff, and if such allegation be controverted, the plaintiff shall be bound to establish, on trial, that it was so published or spoken.

“ S. 165. In the actions mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages, and, whether he prove the justification or not, he may give, in evidence, the mitigating circumstances.

“ S. 166. In an action to recover the possession of property distrained doing damage, an answer that the defendant, or person by whose command he acted, was lawfully possessed of the real property upon which the distress was made, and that the property distrained was, at the time, doing damage thereon, shall be good, without setting forth the title to such real property.

“ S. 167. The plaintiff may unite several causes of action in the same complaint, where they all arise out of,

“ 1. Contract, express or implied; or,

“ 2. Injuries with or without force, to the person; or,

“ 3. Injuries with or without force, to property; or,

“ 4. Injuries to character; or,

“ 5. Claims to recover real property, with or without damages, for withholding thereof, and the rents and profits of the same; or,

“ 6. Claims to recover personal property, with or without damages, for the withholding thereof; or,

“ 7. Claims against a trustee by virtue of a contract or by operation of law.

“ But the causes of action, so united, must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated.

“ S. 168. Every material allegation of the complaint, not specifically controverted by the answer, as prescribed in s. 149; and every material allegation of new matter in the answer, not specifically controverted by the reply, as prescribed in s. 153, shall, for the purposes of the action, be taken as true. But the allegation of new matter in a reply shall not in any respect conclude the defendant, who may on the trial countervail it by proofs, either in direct denial or by way of avoidance.

“ S. 169. No variance between the allegation in a pleading and the proof, *shall be deemed material, unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defence, upon the merits.* Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended, upon such terms as shall be just.

“ S. 170. Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

“ S. 171. Where, however, the allegation of the cause of action or defence, to which the proof is directed, is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof.

“ S. 172. Any pleading may be once amended by the party of course, without costs, and without prejudice to the proceedings already had, at any time before the period for answering it shall expire, or within twenty days after the answer to such pleading shall be served. In such case a copy of the amended pleading shall be served on the adverse party.

“ S. 173. The court may at any time, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or by conforming the pleading or proceeding to the facts proved. The court may likewise, in its discretion, allow an answer or reply to

be made, or other act to be done, after the time limited by this act, or, by an order, enlarge such time; and may also, at any time, within one year after notice thereof, relieve a party from a judgment, order or other proceeding, taken against him through his mistake, inadvertence, surprise or excusable neglect; and may supply an omission in any proceeding; and whenever any proceeding taken by a party fails to conform in any respect to the provisions of this act, the court shall have power to permit an amendment of such proceeding, so as to make it conformable to law.

“ S. 174. After demurrer, either party may amend any pleading demurred to of course, and without costs, on serving a copy of the same as amended within twenty days on the adverse party, who shall have twenty days to answer, reply or demur thereto, if the pleading amended be a complaint or answer, or demur thereto if it be a reply; but a party shall not so amend more than once. Upon the decision of a demurrer the court may, upon such terms as shall be just, allow any party to withdraw the same and plead over.

“ S. 175. When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name; and when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

“ S. 176. The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

“ S. 177. The plaintiff and defendant respectively may be allowed, on motion, to make a supplemental complaint, answer or reply, alleging facts material to the case, occurring after the former complaint, answer or reply, or of which the party was ignorant when his former pleading was made.”

• As our extracts have already been so long, we must pass without comment the 7th, 8th and 9th titles, which appear to us, after a careful perusal, to contain nothing very dissimilar to our own laws. They treat respectively of,

Provisional remedies.

Trial and judgment.

Execution and judgment.

The 10th title is devoted to the subject of costs. It contains sections specifying the actions in which costs will be allowed to the plaintiff as of course, and the amount thereof; also when costs will be allowed to the defendant, and amount thereof. In other actions, not therein specified, costs are in the discretion of the judge; but the section which is open to most criticism, is one which we shall give verbatim, and although we confess that we feel upon peculiarly tender ground, we must record our unqualified disapproval of it. It enacts, that “all statutes establishing or regulating the costs or fees of attornies or counsel in civil actions,

and all existing rules and provisions of law restricting or controlling the right of a party to agree with an attorney or counsel for his compensation, are repealed; and hereafter the measure of such compensation shall be left to the agreement, express or implied, of the parties." To have consolidated the law in this very important and rather intricate subject, is, doubtless, great merit; but, we think, that the section abolishing all scale costs must work mischievously, and we feel certain, were it adopted in this country, that it would inevitably very much lower the standard of the profession. We also can picture to ourselves the surprise and indignation felt in many cases by the unfortunate client when his bill is sent in, drawn up in accordance with a supposed "implied" agreement, and the amount of litigation which would in such cases necessarily arise. This subject, however, although important, is scarcely an integral part of the Code, and does not in the least affect the legal principles which it enunciates. Experience will show how it works in practice; but we fully expect to hear of its revision on this point, as it really tends to place an honourable and learned profession on exactly the same footing as a butcher or baker--or any other worthy tradesman.

The 11th title treats of the important subject of appeals, and enacts generally, that every judgment or order may be appealed against, subject to the qualifications given below:—

The 334th section enacts that—

"To render an appeal effectual for any purpose, a written undertaking must be executed on the part of the appellant by at least two sureties, to the effect that the appellant will pay all costs and damages which may be awarded against him on the appeal, not exceeding 250 dollars; or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal. But such undertaking or deposit may be waived by a written consent on the part of the respondent.

"S. 335. If the appeal be from a judgment directing the payment of money, it shall not stay the execution of the judgment, unless a written undertaking be executed, on the part of the appellant, by at least two sureties, to the effect that if the judgment appealed from, or any part thereof, be affirmed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal.

"If the judgment appealed from direct the delivery or assignment of documents or personal property, they or it must be brought into court pending the appeal. And if the judgment appealed from direct the execution of a conveyance or other instrument, the execution of



the judgment shall not be stayed by the appeal until the instrument shall have been executed and deposited with the clerk with whom the judgment is entered, to abide the event of the appeal.

"S. 338. If the judgment appealed from direct the sale or delivery of possession of real property, the execution of the same shall not be stayed unless a written undertaking be executed on the part of the appellant with two sureties, to the effect that during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon, and that if the judgment be affirmed he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment, to be fixed by the judge of the court by which judgment was rendered, and specified in the undertaking."

S. 342 enacts, that in the cases not specified by ss. 335, 336, 337, 338, perishable property may be sold by order of the court.

The 12th title treats of—

1. Submitting a controversy without action.
2. Proceedings against joint debtors, heirs, legatees, devisees and tenants holding under a judgment debtor.
3. Confession of judgment without action.
4. Offers of compromise.
5. Admission or inspection of writings.
6. Examination of parties.
7. Examination of witnesses.
8. Motions and orders.
9. Affidavits.

The provisions of the 5th, 6th and 7th chapter of this title are in accordance with our own law, except that by s. 398 "no person offered as a witness shall be excluded by reason of his interest in the event of the action," except he be a party to the action or a person for whose immediate benefit it is prosecuted or defended, or an assignor of a "chose in action" assigned for the purpose of making him a witness.

A party may also examine his adversary as a witness on the trial, and a party may be examined on behalf of his co-plaintiff or co-defendant; but the examination thus taken shall not be used on behalf of the party examined.

The Code, therefore, it will be seen from the above extracts, does not admit a litigant party to be a witness for himself; a subject at the present moment of great interest to us as the matter has been much canvassed, and in the case of the County Courts conceded—whether with universal benefit to the cause of truth and justice admits of some doubt, as far as the experiment has yet been tried.



It will thus be seen by the extracts we have given that the effect of the act is:—

1st. To abolish the Court of Chancery and to create one supreme tribunal to administer all the law of the State whether in law or equity.

2nd. To abolish all previously existing rules of pleading and different forms of action, and to substitute such a system of pleading as parties would naturally adopt if uncontrolled before an arbitrator; in the words of the act, “the pleadings must be in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended;” and to provide that all causes shall be decided on their merits alone by the various clauses relating to construction, amendment and demurrers.

To abolish all statutes establishing or regulating the costs or fees of attornies and counsel in civil actions, and all existing rules and provisions of law controlling the right of a party to agree with an attorney or counsel for his compensation.

And to make some important changes in the law of evidence.

The importance of these changes is obvious, and we are glad to find that the Law Amendment Society have requested the American Minister in London to obtain from some of the leading merchants and lawyers of the State of New York answers to the following questions:—

Has the practical working of this code shortened the time of litigation in each suit?

Has the expense to the suitor been lessened?

Have the number of actions increased?

Whether they have been interested in or professionally engaged in any cause arising under it?

Whether any obstacles still remain to prevent a cause being decided on its merits alone? and if so, what are they?

What is the effect of the alteration in the law of evidence?

Whether the members of the legal profession are, as a body, favourable to the new Code, or wish to revert to the old system?

Whether professional incomes are lessened by it?

By these questions the practical working of the Code will be tested, and we shall then be able to judge whether it be absolutely necessary, or for the advantage of the public, that there should be two distinct systems of jurisprudence co-existing in the same country—whether the rules of pleading, as they now exist, may not with safety be abolished, and whether the project of introducing a system by which all causes shall be decided on

their merits alone is Utopian, or, as it has been called simply, an amiable delusion. Upon these points, the commissioners have, in their third Report, expressed themselves so ably that we think we cannot do better, in this place, than give the substance of their Report. They say "it should seem to be scarcely necessary now for the commissioners to vindicate the policy of their reform. The history of the agitation which led to it, the manifest abuses of the old system of legal procedure, the demands of the people couched in language which could not be misunderstood, are familiar to the legislature. In conformity with this feeling, and in accordance with their instructions, the commissioners have removed the ancient forms from the paths of justice, and devised a new system, simple and natural in its construction, easily understood and readily adapted to any remedy which the nature of the case requires. In doing so, they have been obliged to recast the whole system of practice and pleading; with a single eye to a uniform system of pleading and trial, they have arranged the details so as to accomplish that object, and to lessen the labour and expense of legal proceedings. That there should be inconvenience resulting from these changes was inevitable. The former practice, with all its incongruities, was familiar to the Bench and the Bar; much of it consisted of arbitrary forms which a clerk could use. They who had mastered it in their youth, had forgotten the distaste with which they then regarded it, and had come to consider it as something necessary and unalterable. A sudden and total revolution in their art, a change in all their habitudes of thought and practice, the double need of forgetting the old and learning the new, the necessity of increased vigilance, and the still harder necessity of measuring themselves at a disadvantage with others having less to unlearn and more power to learn,—all these causes would necessarily make a new system unpopular with the members of the legal profession and no inconsiderable portion of the judiciary."

That however is not an argument against the change, it only proves the greatness of it. Had it been less complete it would have been less censured; general approbation would have proved it worthless by showing that it encountered no prejudices and opposed no interests. That the change is great is certain, but it is certainly not greater than was required; and nothing less would have effected a remedy for existing abuses.

The distinction of actions, and of legal and equitable remedies had their origin in a state of society as remote from our modern civilization as the modes of communication of our day are different from those of our ancestors. It was time that the forms

of action should pass away, to take their place with the wager of law, trial by battle, compurgation by witnesses, and the grand assize, which were once as important parts of the English law as are now the forms of actions. To resist their abolition now, is to maintain, either that they are eternal, or that society has not yet reached that stage of civilization when they can with safety be dismissed; neither can be maintained without disparagement to the intelligence of the age.

Law is not in its nature stationary, beyond all other sciences. It must change with changing manners, the diffusion of wealth, new channels of industry, and more general intelligence. That which was natural in the fifteenth century, is strange and uncouth in this; things which were then convenient have now become intolerable; the knowledge of that day has been multiplied many times; acts then in their infancy have grown to perfection. In other branches of knowledge advances are constantly made; the mind searches for new truths and the search is encouraged. In respect to law is the rule reversed? Are we to tread for ever in the ways of the past? In short, the argument for a legal system which is founded upon its antiquity, or indeed upon any thing but its intrinsic merits and its fitness for the people for whom it is framed, leads to an absurdity. The Report then says, "The change which the constitution contemplated, and the act appointing the commission required, had been long in coming, but was inevitable." The public mind had arrived at that stage when it could not be satisfied with less; and the commissioners say that they felt bound not to abandon it because some obstacles interposed to its immediate success, or because some present inconvenience might result from it. They then allude to the difficulty, under the most favourable circumstances, of making a new Code of laws, and claim the merit of having made the first Code of procedure ever made in a country holding the common law of England, and of supplanting, by a new work of their own creation, that heterogeneous mass called "Practice," which has been accumulating for ages; and then state that the few months of trial through which the Code has passed (written 30th January, 1849) has justified them in stating, that their Code has made justice more certain and more speedy, and that they have accomplished it in such a manner as to leave no case unprovided for and no right abridged.

We have now completed the task we proposed to ourselves, and we hope that we have discharged it so as to enable our readers who have not the Code by them, to form a clear notion of the present system, and the great changes it involves; and let us not forget, that it is not among a poor, homely, un-

educated and simple people that this great experiment in legislation is being tried, but among a people who are our rivals in commerce, equal to us at least in intelligence, wealth and luxury, with all the wants of a high state of civilization, and whose laws to be successful must embrace nearly as wide a field as our own. The boldness of the attempt, and the righteousness of the motives which led to it, should at least command our respect and sympathy. It is possible that the framers of the New York Code may have gone too far, and that difficulties may be experienced in the practical working of their Code which its authors may not have foreseen; when men's minds are strongly excited upon any subject, this is always to be apprehended; and public indignation against the abuses of legal procedure may have led in this case to the sweeping away some of the sound principles of law as well as the errors of practice, and we think that in some parts of this Code the commissioners have scarcely been sufficiently governed by caution or guided by experience. We do not here attempt a critical analysis of this Code, but have aimed simply in this article to lay its leading provisions before our readers. For ourselves we have derived great pleasure from this task, and we rise from it with increased respect for a people who could, with an energy of will characteristic of the American nation, resolve to throw off a system which, though sanctioned by the practice of centuries, they felt to be an evil, and who found agents able to execute with promptitude their wishes. To consolidate law is always beneficial; it is then better administered and better understood; it conduces to certainty, because the framers of the consolidated law have the whole of their materials at once under their eyes, and therefore can readily make the different parts consistent.

In conclusion, we venture to express a hope, that the example may not be entirely lost upon ourselves, but that it will stimulate our law reformers to raise their minds at once to the contemplation of a radical and efficient reform, for they now have before them a proof that it is possible to sweep away all pre-existing laws without rushing into chaos; and further, that by going to work in a right spirit—by studying authorities simply for the sound principles to be found in them, it is possible for educated men and “experts,” with a knowledge of the wants of the age in which they live and unencumbered by any check, to create a system which shall answer well in practice, which shall afford redress for all civil wrongs, and power to enforce all civil rights, and yet be cheap, simple, just, and intelligible: and we avow our opinion, that our own law is too mathematically correct to work well in every-day practice; that it is not necessary that

the rules of law, when they are beside the merits, should be rigidly adhered to; that it is necessary in law to have some elasticity to meet ever-varying circumstances; and that, in a country like this, with a free press ever ready to seize upon and chastise any violation of judicial rectitude, no danger can be incurred by allowing power to the judges to amend in all cases where the strict letter of the law would manifestly work injustice.

*R. F.*

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## ART. II.—THE OFFICE OF WOODS AND FORESTS, LAND REVENUE, WORKS AND BUILDINGS.

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THE “Woods and Forests” is perhaps the best abused office in the Government. The Foreign Office may sometimes be exposed to more slashing charges; rendered more serious too, by the very different importance of its relations. But such charges are generally grounded on mistaken policy or stupidity, or at worst, partisanship, not upon nepotism or dishonesty. A Colonial Secretary sometimes excites a passing yet loudly expressed indignation by his petulance: but in this case as in the last there is always a large and powerful, sometimes the larger and more powerful, party bound by honour and inclination to support the ministers. Poor Law Commissioners are every now and then dragged blinking into unaccustomed light, when some pauper has been starved through the hard-heartedness or avarice of a relieving officer: but for a good, enduring cause of grumbling there is nothing like the Woods and Forests. Stupidity of intention, carelessness and petulance in transacting business, ignorance and wastefulness, gross frauds, or, in the words of an Ex-Chancellor, negligence so crass as to amount to fraud—every description of charge is laid against the unfortunate “Woods,” who have not equally with other branches of the Government the advantage of a disciplined phalanx to support them. Nor can it be said that these difficulties are altogether undeserved. No terms can be too decided to describe the transactions which were brought to light before the celebrated Committee appointed in 1786. Frauds and mismanagement of various descriptions have been exposed on various occasions by the committees of inquiry which have since then been from time to time appointed—and the last of such Committees, when preparing their Report,

expressly negatived and rejected out of the draft Report the proposition that "the evidence before the Committee justified the belief that whether acting under the express and unqualified injunctions of parliament, or in the unfettered exercise of their own discretion, the duties of the Commissioners had been conscientiously and judiciously performed."—(*Parl. Papers*, 1849. XX. *Reports from Committees*.)

Yet we question whether all the obloquy which has attached itself to the management of this office during so many years has, at least during the present century, been deserved. Frauds there undoubtedly have been; but frauds also are perpetrated in every branch of the administration—and frauds are constantly perpetrated by servants under the very eye of the master. We question much whether if property of the same extent and description belonged to one individual, or to half a dozen, frauds as extensive would not have been practised. The forest lands of the Crown extends over 150,000 acres, a great part of which has been inclosed and planted since the end of the last century.<sup>1</sup> The master's eye runs quickly over an open farm of 500 or even 1000 cultivated acres; but the care of the greater part of these wild woodland districts is abandoned to thinly-scattered servants, liable only at intervals to supervision and control; and there is no master personally interested in the welfare of the land. Moreover, in many parts there are ancient and modern rights of common, of pasturage and firewood, &c, which interfere with the indubitable rights of the crown and the public, and constitute a strangely incongruous mixture of claims and interests; for the right to and management of the timber resides in the crown, or its officers. The proprietor of the underwood must wish to prevent the growth of the timber, by which his crop is diminished; and all claiming as grantees of the herbage, again, will desire to see no wood of any kind: the whole being a perpetual strife of jarring interests, in which no party can improve his own share without injuring that of another.

The system under which the Land Revenues of the Crown were formerly managed, was indeed an outrageous example of

<sup>1</sup> The New Forest alone still contains 67,000 acres, besides 25,000 which have been inclosed, and over which the crown has forestal rights. But Waltham Forest has now only 12,000 acres out of the 60,000, of which it once consisted. Bilhagh and Birkland, together 1,500 acres, are the only remains of the once noble Sherwood Forest, which included 95,000 acres; while Rockingham, once the most extensive royal forest in the island, is now reduced to 10,500. In many now disafforested lands, rights are reserved to the crown, the charge of which is thrown upon the "Woods and Forests."



complicated jobbery, created apparently merely to engender and conceal still more. Not to refer to very early times, when the Royal domains were under the immediate management of the monarch, Henry VIII., upon the confiscation of the monastic property, created a special court of management, the Court of Augmentations;<sup>1</sup> and shortly afterwards another, the Court of the Surveyors-General of the King's lands.<sup>2</sup> This was however shortly afterwards dissolved and a new Court of Augmentations instituted,<sup>3</sup> which continued till Queen Mary's reign, when it was by letters-patent dissolved, and its authority annexed to the Court of Exchequer<sup>4</sup>—subject as to the Church lands to the authority of this court, but as to other property without any controlling authority. The Land Revenues of the Crown were managed by a great variety of local officers with a sinecurist at the head of each department. The auditors of the land revenue were foremost among these. By an agreement between the Crown and House of Commons on the accession of George III., these revenues became subject to the supervision and control of parliament, and they were thus brought into connexion with certain very extravagant sinecurists, entitled auditors of the imprest, whose offices were abolished in 1785 with a retiring pension of 7000*l.* per annum each—almost as gross a job as the six-clerks' office reform in later days. By the same act, 25 G. III. c. 52 (1785), were constituted five Auditors of Public Accounts, to whom in 1799 were transferred the duties of the Auditors of Land Revenue, whose office was however not finally abolished till 1832. There were besides the Surveyor-General of the Land Revenue of the Crown, the Surveyor-General of His Majesty's Woods, Forests, Parks and Chases,—Wardens, Chief Justices, and Justices in Eyre, north and south of the Trent, the Surveyor-General of His Majesty's Works and Public Buildings, all exercising very extensive authority in very nearly the same subject-matters, yet totally independent of each other; an arrangement so curiously infelicitous as to excite mutual jealousy without the security of any mutual check; and increasing tenfold the delays and expense inevitable on such a multifarious management, without any probability of increasing the vigilance or even ensuring the honesty of the officers. The two first of the above offices were, however, amalgamated by the 50 G. III. c. 65 (1810), under the title of His Majesty's Commissioners of Woods, Forests, and Land Revenues. The offices of Wardens, Justices in Eyre,

<sup>1</sup> 27 Hen. VIII. c. 27.<sup>2</sup> 33 Hen. VIII. c. 39.<sup>3</sup> Letters-Patent, 38 Hen. VIII.<sup>4</sup> Letters-Patent, 2 Ph. & M.; 1 Ph. & M. sess. 2, c. 10, and see the preamble 1 Eliz. c. 4, s. 15.



&c., were by the 57 G. III. c. 61, abolished, and their duties, which beyond the receipt of very considerable salaries had become merely nominal, devolved on the Commissioners under the last mentioned act, which repealed the whole of the previous statutes on the subject, continuing and re-enacting all their useful provisions, so that that act, and the statute 2 Will. IV. c. 1 (1832), contain the whole of the present law on the subject. The act of William IV. united the office of the Surveyor-General of Works and Buildings with the office of the Woods and Forests, three Commissioners being appointed with the present title of "The Commissioners of Her Majesty's Woods, Forests, Land Revenues, Works, and Public Buildings."

By these acts the whole of the management of all the royal domains is vested in these three Commissioners, who are, however, strictly bound to follow in every respect the instructions of the Treasury. Annual reports are laid before Parliament (instead of triennial as required by the act of 1794)—full and detailed estimates are laid before the Treasury at the commencement of each year, nor is it apparently possible to place the management more wholly under the control and within the knowledge of Parliament than by the present system. There is in fact, a triple check—the principles of management are prescribed by Parliament—the application of those principles is sanctioned by the Treasury—and the expenditure of the money is subject to the examination of Auditors—besides the very efficient check of the annual accounts above described.<sup>1</sup>

The immense proportion which the expenditure in the Woods and Forests bears to the receipts when compared with the expenditure and receipts of private property is often very triumphantly but very fallaciously dwelt upon. Thus, in the return for last year, 1849, the receipts are stated at 414,179*l.*, and the expenditure at 246,590*l.* Private estates, even when of very great extent, being subdivided into farms, enjoy the advantage of having at the head of each farm an unpaid commissioner personally interested in the highest degree in the productiveness of the land. This is both cheap and effective: but, even in these cases, the total expenditure in labour, manure, and stock, bears a very high ratio to the gross receipts. Labour alone, in high class farms, often ranges from 2*l.* to 4*l.* per acre. But no such plan is capable of being put in practice with the crown lands. If they are to be retained as nurseries for our navy, according to the recommendation of every successive committee,

<sup>1</sup> A. Milne, Esq., examination before the Committee of the House of Commons, 26th July, 1833.

they cannot be so farmed out. Moreover, very great expenses are annually necessary for making proper plantations and enclosures to maintain a succession of falls in future years, the infamous system of the last century having rendered it both difficult and expensive to retrieve our ground. Nor is this the only consideration by which we may account for so large an annual expenditure. There are in London and Westminster alone, under the care of the commissioners, seventy-three buildings paying no rent, and maintained and repaired out of the gross receipts of the office. These include, besides, all the treasury, government offices, and official and other residences, buildings so extensive and costly as Buckingham and St. James's palaces, the Tower, the Mint, all the prisons, the British Museum, the Post-office, Somerset House, the Houses of Parliament, &c.<sup>1</sup> In addition to these, there are, under the same care and maintained and repaired out of the same fund, nearly two hundred and fifty buildings in the various royal parks and forests, varying in importance from foresters' cottages to royal residences. Any of our readers who ever had anything to do with any property with a dozen cottages upon it can, or perhaps cannot, imagine the expense and trouble of such a charge as this. But this is merely the beginning of troubles. There are, besides, about five hundred separate leases of houses in London and Westminster. That is nothing. Exclusive of these, and exclusive of the management of 150,000 acres of forest land in every stage of growth and improvement, "The land revenues of the crown," says the Hon. C. Gore, before the committee, 1849 (the accounts of which, notwithstanding the joint management, are kept distinct from the Woods and Forests, and also from the Works and Buildings)—

—"The land revenues of the crown in England, exclusive of the crown estates in the metropolis and the revenues of Monmouth and Chester, arise from the rents of manors, lands, &c., situated in various counties in the tenure of leases, or tenants from year to year, forming together about five hundred and twenty tenancies under the crown subject to rents forming a total of 55,000*l.*, and fee farm and other unimprovable rents, generally of small amount, varying from 1*d.* to 1200*l.* per annum, issuing out of the lands of other proprietors and situated in almost every county in England. The number of these rents in charge with the receivers is about 1780, and they

<sup>1</sup> Of course such occasional cases of new building or rebuilding as those of the new Houses of Parliament, the new buildings at Buckingham Palace, &c., are exceptional. But these are under the care and superintendence of the commissioners: rendering a numerous and intelligent, and therefore expensive, staff of officers necessary.

amount yearly to about 3500*l.*—that is, in England. In Wales the unimprovable rents amount to 4000*l.*”

Do all these duties, so many and so diverse, appear sufficient for three ordinary mortals? In addition to these, the commissioners are specially charged with all the crown revenues in Scotland and Ireland, till recently managed by separate boards, involving often questions under a different system of laws, and in Scotland often expressed in an obsolete diction, in obsolete coins which, when they have been translated, turn out to be insufficient to pay for the inquiry. They are specially charged with all the metropolitan improvements, the alterations in Leicester Square, New Oxford Street, Farringdon Street, &c.; the formation of new parks—Victoria, Battersea, Primrose-hill; the geological surveys of Great Britain and Ireland, &c., &c., &c.; besides being applied to on every possible occasion by parliament or government for information or advice. For example, in the blue books of the House of Commons for the single year 1847, there are fifty-three separate reports from the Commissioners of Woods and Forests to the House of Commons relating to applications for a like number of local acts from every part of the kingdom on every variety of topic—water and gas-works, markets, cemeteries, railways, sewers, police, bridges, havens, and harbours. There have moreover been, since 1833, upwards of thirty public acts of parliament passed affecting the Woods and Forests, all, says Lord Duncan, the chairman of the select committee, 1849, introduced and taken charge of by the first commissioner.

Evidently the office-staff and expenses, requisite for such a business as this, is beyond all comparison with the expenses proper in the management of any private estate. Yet we find that the annual net income had increased by 30,000*l.* in the interval from 1834 to 1848, and this notwithstanding the expenditure of 300,000*l.* (part of certain sales-monies in the hands of the commissioners) in unremunerating investments, *e. g.* the purchase of new parks and beautifying and improving the old.<sup>1</sup>

As an instance of the alterations which have been effected, and what the condition of the public parks even in the metropolis, we shall simply quote from Mr. Sheddon's evidence before the select committee on the land revenues in 1833:—"The nature of the improvements in Hyde Park was filling up the whole of the inequalities in the land: there were several large old gravel-pits, three of immense size, and the whole of these

<sup>1</sup> H. C. Reports and Papers, 1849. XXX.—Examination of Hon. C. Gore.

were filled up and brought to an equal surface. The whole of that part called Buckden Hill was in a very bad state; the herbage, in fact, was all overgrown with goose grass and sedge grass, and the whole of the land in that part was like a bog—it was impossible to walk over it.” And after describing the operations for reclaiming this waste, the same witness states—“This had the effect of turning the park from what it formerly was, a state as wild as a mountain in Wales or Scotland, to the finest herbage; and I think there is not any within ten miles can excel it.” “It was worth little or nothing before—not worth 5s. an acre; but, if I were now allowed to contract for it, I should be willing to give 4*l.* an acre for it for the feed of cattle.”

What a description of that which the “Times” now so justly calls “our beautiful park!” What an impostume was Buckden Hill in the chief of the lungs of London!

This immense improvement, sanitary as well as pecuniary, just described was effected at the cost of 5*l.* per acre. But it is not merely the sanitary or the pecuniary results that are, perhaps, the most striking. The items of expenditure in the commissioners’ accounts indicate that ornaments and conveniences were then added for the first time, of which it now seems incredible we could ever have endured the want, at least in this nineteenth century. The lodges and entrances at Cumberland-gate, Stanhope-gate, Hyde Park-corner; the bridge over the Serpentine; a new road from Cumberland-gate round the park and across the new bridge; the union of the Long Water in Kensington-gardens with the Serpentine, formerly separate ponds of small size and at different levels—not to mention new railings, new roads, new drains in all the parks; removing the old park walls in Park-lane, Piccadilly, and Knightsbridge-road; laying out the gardens and ornamental waters in St. James’s Park: such are but a few of the items which figure in the accounts and estimates rendered by this office for a year so recent as 1833.<sup>1</sup>

It may not be uninteresting to subjoin a slight sketch of the history of these crown lands, showing their varying value, management and extent, and the different policy which has prevailed respecting them.

The principal source of the revenue of the monarch in every country in Europe in the feudal ages having been the lands and

<sup>1</sup> The greater part of these alterations were effected before that time, but they were then still going on. Parliamentary Papers, H. C. 1833. Land Revenue, p. 78.

domains retained by the crown, it was naturally to be expected that a monarch of the character of William I., whose admitted rights as conqueror and king extended to the ownership of every acre in the realm—to whose free grace and mere motion every proprietor owed all the land he held,—should provide largely for the supply of his own necessities. Accordingly upwards of 1400 manors or lordships, besides lands in Shropshire, Middlesex and Rutland, quit rents and other payments, furnished him with an income amounting, according to Domesday, to 1061*l.* 10*s.* 1*d.* per diem, or near 400,000*l.* per annum—a sum which, derived as it was wholly from land, and taking into account the greater weight of silver in a pound (which then contained twelve ounces instead of somewhat less than four, as at present), and the immensely increased ratio of agricultural production (an increase which it is scarcely possible to estimate generally with any exactness, but which may be taken at from ten to fiftyfold) cannot represent a smaller amount than 12,000,000*l.* per annum at the present day.<sup>1</sup> And this, exclusive of the 60,000 men at arms, which the feudal nobles were bound to maintain during forty days to attend the king, corresponding to the same number of knights' fees.

But this vast extent of territory was not all which remained at the disposal of the crown. Frequent forfeitures, attainders,

<sup>1</sup> The prices of land and of agricultural produce, as well as money, varied so suddenly and so greatly, that it is extremely difficult to form any estimate of the changes since those early times. The value of land, however, may be calculated better by comparing it with that of agricultural produce than with money, and with cattle rather than with corn; for owing principally to the want of capital, and the prejudices and restrictions against that most useful trade, the regrating of corn, the prices of grain in June and July, just before the harvest, were frequently three, four and six times the price in September or October. Taking cattle and horses, therefore, we find in the *Chronicon Pretiosum* of Bishop Fleetwood, p. 67, mention of purchases of land, in the century immediately before the Conquest, 2 hydes for 100 shillings, 1 hyde for 100 shillings; and again, 1 acre for 1 shilling; a hyde contained from 100 to 120 acres of land. At the same time, the price of a palfrey is stated at 10 shillings; and again, of a horse, 30 shillings (Saxon, i. e. 150*d.*, five pence to 1 shilling, 48 shillings in 1*l.*), a mare or colt 20 shillings (Saxon, i. e. 100 pence), a cow 24 pence, &c. Comparing the most unfavourable of these values, a palfrey was then worth at least 10 acres of land, and a cow 5 acres. But at the present day an average horse is not worth more than one acre, nor a cow worth half an acre of average land, showing at the least a tenfold increase in the value of land. And this, multiplied by the difference in weight in a pound of the precious metal, viz. silver, then the sole commercial standard (as it is now in most European countries), but which we have replaced by gold—so that each of the Conqueror's pounds is worth three of our pounds—gives 30 as the multiple of the Conqueror's income to represent it in our present coinage; i. e. his 400,000*l.* was equivalent to 12,000,000*l.* in these days, as stated in the text.

escheats would, in course of time, have placed nearly the whole soil of England in the beneficial possession of the crown, had it not been for the lavish and profuse expenditure which quickly overran the bounds even of these ample resources, and compelled recourse to the subject for supplying, by loans and benevolences, the wants of the crown. These applications were, however, even more distasteful in early ages than they are now. The principles of taxation were unknown—the practice was abhorrent to the then notions of freedom and right: and it was, moreover, with the express object of preventing any necessity for making these abhorred applications, that such enormous revenues had been in the first instance set apart, and retained by the crown. The constant petition of parliament in answer to such applications was, “that the king should live upon his own, so as not to burthen the state, nor require any relief from them;” and accordingly, rather than grant new taxes, parliament repeatedly passed acts of resumption, by which the lands granted by the king or his predecessors were without ceremony resumed and revested in the crown. But here a distinction was taken between the ancient demesne, originally reserved by the Conqueror, and those lands which had reverted to him or his successors as superior lord by forfeiture, &c. The latter he might dispose of at his pleasure, but the former, says Sir Robert Cotton, “our ancestors held impious to alienate from the crown.”<sup>1</sup> The king’s grants of it were indeed valid as against himself and his successors; but the legislative power had an undoubted right to annul them without recompence or ceremony; a right which they seldom failed to find occasion to exercise, when a demand for fresh aids was made.<sup>2</sup>

The taste for profuse magnificence in war and peace, which distinguished the chivalry of those ages; the ready and insatiable drain which the crusades afforded; the necessity which three successive usurpers were in to reward and secure their followers, dissipated in each reign which succeeded the Conqueror’s nearly the whole estates which had been settled upon him, notwithstand-

<sup>1</sup> Cott. Postum. 179.

<sup>2</sup> We have taken no notice of a very extensive feudal prerogative mentioned by Manwood, as belonging to the crown (*viz.*), the right by which the king could, by letters-patent, declare any land, whether his own domain or any other person’s, to be forest; not thereby interfering with any other right of the owner to such lands (if belonging to another person), except the right of enclosing them with such a fence as might impede the deer, and the right of taking or pursuing the deer; which immediately upon the afforestation of such lands belonged to the king alone. But probably this right, which does not seem to have been much acted upon, at least since the time of the Conqueror, would be held to be taken from the crown since the abolition of feudal tenures, 12 Car. II.



ing the repeated acts of resumption passed under William the Second, Henry and Stephen. And similar acts were found necessary in almost every subsequent reign in the twelfth, thirteenth and fourteenth centuries. There were, however, many exceptions from those acts; and thus the private revenues of the crown became more and more inadequate to the burthens they had to support. Henry V. had only 56,966*l.* per annum, Henry VI. only 5051*l.*, and consequently acts of resumption were passed in the reigns of Henry VI., Edward IV. and Henry VII. The annual rent of the monasteries, suppressed by Henry VIII., and seized by him for his own use, amounted at the time to 273,000*l.*, and were estimated in 1792 at 6,000,000*l.* of annual rent; but nearly the whole of these were granted away again by the king, and he left the revenue lower than he found it. The policy of Elizabeth, which induced her from time to time to dispose of parts of her domains, rather than incur the unpopularity of demanding supplies from her subjects; the unbounded profuseness of James I. to his favourites; the sacrifices made by his unfortunate son, in endeavouring to govern without parliaments, and the civil wars which ensued, made still further inroads on the crown property, and the remainder, still considerable, was nearly entirely disposed of under the Protectorate.<sup>1</sup> These sales were made void on the Restoration; but yet much was lost to the crown through concealments and through forbearance to *bonâ fide* purchasers, or to such as had favoured the Restoration. About the same time, the permanent peace establishment of 1,200,000*l.* per annum was voted; the seignorial rights and profits of the crown being abolished, and the value of the royal domains reckoned as part of the revenue of the crown at 195,000*l.* per annum. Charles II., James II. and William III., still continued, from profusion or policy, the system of former reigns, and bills were constantly brought forward by one party for the resumption of the lands granted by the crown; by the other for restraining of any future grants. The ministry generally supported the former class of bills, and opposed the latter. The crown lands, as has been observed, were destined not to support the dignity of the monarch or the public expenses of his government, but for his private expenses, either in personal expenditure, or in gratuities and rewards to favourites and useful servants. Every attempt to obtain an act

<sup>1</sup> (Viz.) Land, annual value 120,000*l.* at ten years' purchase . . . £1,200,000  
 Forests and houses belonging to the crown . . . 650,000

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£1,850,000

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by which his power of alienation might be restrained, was therefore naturally opposed by those who thought themselves the most probable objects of his bounty. We may likewise remark a very important change which took place during the period from the Conquest to the Revolution, in the nature of the trust reposed in the crown, and the security preserved by the subject. During many ages in the early part of that period, the crown had an independent revenue, adequate to all the expenses of the government, but our ancestors had the arms in their own hands. Whereas in the latter part of the same period the arsenals, magazines, fleets and armies; came necessarily to be entrusted to the sovereign, while the far greater part of the money required for the support of the dignity of the crown, and all that was necessary to provide for the defence of the kingdom, was on the other hand kept in the power of the subject.<sup>1</sup>

Immediately upon the accession of Queen Anne, the economical party, who had so long sought to tie up this source of corruption and peculation, succeeded in carrying the Civil List Act,<sup>2</sup> which took from the crown the power of granting leases of houses for a longer term than fifty-six years, or of lands for more than thirty-one years or three lives; and the bill of resumption, by which it had been intended to place fresh rewards for servility at the disposal of the ministers, was dropped. Nor has there been any act of resumption since the sixteenth century, when the revenues had at length been so much diminished that they could no longer be expected to answer their original purpose. The crown land revenues or rents reserved were by this time reduced to but 482*l.* 16*s.* 7½*d.* net in England, and 227*l.* 8*s.* 11½*d.* in Wales.

The Civil List Act, however, did not produce the results which the advocates of the measure had anticipated. Whatever the extent to which the estates of the crown had been previously to that act, either openly given away or under pretence of a sale surreptitiously bestowed at an undervalue upon favourites of the monarch or creatures of the minister, yet while they remained the property of the crown, there was at any rate some degree of prudence and attention bestowed upon their management. The better condition the estates were in, the more money, it was obvious, would be obtained by a sale of them for the necessities of the monarch, or the greater favour would be bestowed if they were given away. Their good management was therefore an object deemed worthy the attention of our kings and of their ministers.

<sup>1</sup> 1 Blackst. 287; 12 Rep. Comm. Land Revenue, 1786.

<sup>2</sup> 1 Ann. c. 7.



But by the Civil List Act (1 Ann. c. 7) that source of influence and supply, and along with it the inducement to give the estates any care or management, was cut off. Had the estates been let at their full value, according to the provisions of the act, the revenue might have improved; but as no sale could take place, no funds could be supplied for the immediate wants of the crown; no dependent could be enriched at the expense of the nation.

It was not long, however, before the whole system which had been in vogue before the Civil List Act was again in full force, with nearly the same destructive consequences to the annual revenue, and with still more fatal effects upon the lands themselves, the poor remnants of the once princely domains of the crown. The first attempts were made within a very few years, when ministers began to obtain for their friends grants of parts of these lands in perpetuity under the sanction of particular acts of parliament. The publicity of this mode rendered it very inconvenient, as every bill was certain to excite repeated attention, and a more quiet method was soon discovered. The act had provided that in no case of any lease, less than the ancient or most usual rent should be reserved; but if the lands had not been before in lease, then not less than one-third of the full improved annual value, leaving the rest to be made up by the clumsy and wasteful expedient of a fine; in this case, particularly clumsy and wasteful, as no provision was in fact made to prevent the fine being wholly remitted, or, if taken, it might be calculated at any rate of interest the minister at the time might direct. Accordingly the commissioners of 1786 found that in every instance the lowest possible rent had been reserved, the longest term of years granted, and the computation of the fine had always been made at the highest rate of interest. Not satisfied with five per cent., seven, nine and even ten per cent. was the ordinary rate in many instances, and the amount calculated at compound interest. Such a transaction is, in fact, nothing else than a sale of a reversionary right, discounting the present worth after the rate of nine or ten per cent. compound interest; extravagant, though intelligible, if the vendor were a young heir in the hands of Jews; scandalous, incredible, in the ministers of a government which could at all times borrow at the rate of three or four per cent.<sup>1</sup> The results of the system

<sup>1</sup> As an example of the ruinously low prices thus obtained, suppose a beneficial lease worth to the tenant 100*l.* per annum, of which twenty years are unexpired, the fine for thirty additional years would at ten per cent. only amount to 140*l.*; or if thirty years were unexpired, the fine or price for twenty additional years would be but 60*l.*—*12th Report Commissioners Land Revenue, 1786.*

are detailed in the Report of the Commissioners referred to below. For, the ancient and modern rents reserved on the whole averaging one-eighth of the improved annual value, and the other seven-eighths being taken by fines; it appeared that on the average of sixteen years, from 1769 to 1786, the government received twice as much from the one-eighth reserved by way of rent as from the seven-eighths paid by fines; the respective amounts being, for the one-eighth annual rent 13,662*l.* on those sixteen years, and in respect of fines 7078*l.* only: although on an average of years, fines, if properly and fairly taken, ought to be equal to the amount of annual rents which they profess to represent.

The management of the forest lands was even worse. There a bad system was carried out in the worst manner. As the commissioners of 1786 observed, a mode of payment of salaries and emoluments could hardly have been devised more dangerous to the interests entrusted to the care of the surveyor general. The nominal salaries being small, the surveyor retained great part of the allowances made to him for his deputies and assistants; and an underpaid staff followed without fear or shame the example of their chief. The fees of the surveyor too, five per cent. on all receipts and expenditures and on the produce of all woods cut, and fees for every tree cut for the use of the navy, were so many direct premiums for profusion in the expenditure without regard to utility, and to felling timber without regard to improvement.

The difficulty of managing large properties, especially of woodlands, appears however to be gradually yielding to the progress of modern times. The means of communication, new roads and inclosures, scientific investigations above and beneath the surface, are gradually wearing out the almost savage ignorance and barbarism which seems to have pervaded the royal forests but a few generations back; and when mismanagement is discovered, it excites deeper and more general indignation, and punishment follows more swiftly and more surely, so that culprits are naturally less bold and frequent than before;<sup>1</sup> and we think that the whole case as it stands at present is summed up with tolerable fairness by the Select Commissioners in their Report:<sup>2</sup>

<sup>1</sup> We think this is in the main true, although there are certainly some remarkable and striking exceptions. Thus Major Freeman, the government inspector, sent down to examine into the state of the New Forest in 1848-9, was burnt in effigy right off Lyndhurst, Mr. White, the Lord Warden's deputy, actually supplying fuel from the Royal Forest for the purpose.

<sup>2</sup> Draft Report, 1849; Parliamentary Papers, xv. The report as presented does not seem to be yet in print. And see ante, p. 1.

“Instances of laxity on the part of the local agents of the board have presented themselves in the course of evidence, extending over the transactions of many years, and involving a very multifarious and minute expenditure of monies. During the long continued illness of the immediate representative of the board in New Forest, and through the agency of persons more immediately subjected to his control, and therefore more immediately responsible to his authority, frauds, it is apprehended, have been committed to a considerable extent in that forest, attended with much pecuniary loss. The ill-advised selection of an officer for the local management of Salcey Forest upon its enclosure in 1828, appears to have resulted in proceedings equally reprehensible in their character and lamentable in their results. Your committee are not disposed to underrate the importance of these occurrences, but upon the whole they think they are justified in regarding them as exceptions to the general course of management, and as owing in some measure to the numerous and sometimes conflicting duties which have of late years been imposed upon the department.”

The above observations are confined to the mode in which the actual powers of the office of Woods and Forests are exercised, and a slight sketch of the history of the office and how those powers have arisen. It is an additional question whether the objects which the present arrangements have in view are attainable or worth attaining; and another question again, whether the present arrangements and the present powers be sufficient to secure those objects; and still another, whether the nature of the estates and interests now claimed in the Royal Forests be not such as to demand the immediate interference of the legislature. As to the first of these questions, the main object, at least as regards the part properly called “Woods and Forests,” is avowedly the maintenance of a sufficient supply of timber for the royal navy, an object which every successive parliamentary committee has declared expedient to be aimed at and practicable to be obtained; though, on the other hand, it is broadly asserted in the “ordinary channels of information” that it is inexpedient in theory and unattainable in practice. And for the second and third of the above questions.—Since the foregoing observations have been in type, there has been published a “Report of the Royal New and Waltham Forests Commission,”<sup>1</sup> founded upon the admirable Subreport of the secretary, J. B. Hume, Esq., which is annexed to the Report, being, in fact, a right learned treatise, in which the whole forest laws and the circumstances in which royal forests are now situated are reviewed at much greater length than could possibly be accorded to ourselves here.

<sup>1</sup> Pp. 66—under 12oz., price 8d.

We much regret the late appearance of this paper, which though upon a different part of the subject, we should with great advantage have made use of; but can only refer our readers to it with an especial recommendation. In particular, the royal privilege of afforesting any subject's land (ante, p. 27, n.) is very clearly shown; the various rights of the crown and private individuals, legal and illegal, are described, and the desirableness of coming to a settlement of rights forcibly demonstrated.

“The present state of the New Forest is little less than absolute anarchy. . . . The records are insufficient to ascertain who are entitled to rights; there is no certainty what law, forest or common law, is current; and, consequently, what officers have power, and under what authority to interfere.”

Notwithstanding 20*l.* forfeitures for every offence, “drifts are not made, and, now-a-days, from sheer inability to make them legally, not from want of will. Squatters come and settle here who cannot legally acquire, but who nevertheless exercise, rights of property; the persons legally entitled to common and other rights are oppressed and defrauded by the usurpers, who surcharge grossly in respect of their unlawful usurpations; and there are no means of ascertaining which are the persons legally entitled.” (Sub-report, p. 31.)

Such is the description which applies more or less to 150 square miles of excellent land within a few miles of Southampton, and which ought to be as valuable as any land in England, whether for building or any other purposes. At present it has not, and cannot have, an owner. We seem reverting to Eastern and primeval manners. There is nothing new. “The thing which is hath been of old”: nature tends constantly to a reproduction of the same models; and society is a part of nature, a truth not always kept in mind. A squatter may walk into the New Forest and select his location with the same independence as if he were the inhabitant of a new born planet; and we have lately seen the Ausonian legend of Cacus, or rather the Arabian story of Ali Baba and the forty thieves, “done into English” by a constable of the L division and a gang of rascals under a dry arch of the South-Western Railway.

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## ART. III.—THE OFFICES OF THE LORD CHANCELLOR.

## [SECOND ARTICLE.]

ON every occasion of proposing to abrogate an existing institution, which is of such a nature as to require a substitute, it is incumbent on the innovator to establish three propositions satisfactorily. 1st. It must be shown that the actual state of things is productive of evil. 2ndly. It must be shown that a substituted plan may be put in operation which will remove the evil complained of. 3rdly. It must be shown that this substituted plan will not itself be productive of evil, or at least of evil as great as that which is sought to be remedied.

Now, that the existing arrangements in Chancery are productive of evil, scarcely any person or party will wholly deny. Every person will admit the existence of defects in the constitution of the court: though some will be found (whose number, indeed, is daily diminishing) to maintain that, as a whole, the merits so far exceed the defects as to render the latter inconsiderable, and that the whole court is, as a human institution, perfect. It would be absurd to deny that, in our present state of society, a system of equitable jurisprudence is a matter of absolute necessity; and inasmuch as the Court of Chancery is the only tribunal in this kingdom which exercises an equitable jurisdiction, we acknowledge that it supplies a necessary want, and is therefore on the whole, not merely advantageous, but necessary. But we allege that, in consequence of the constitution of the court, it does not administer so much of this inestimable equity as it ought and might; and that this falling short is, viewed in itself, a mere denial of justice and an unmixed evil. Our quarrel is not with the object, nor with the general principle of the machine, but with the construction of certain parts, their form and strength, and the strain laid upon them.

And although a great deal of most important reforms might be recommended, as a great many have latterly been effected in the inferior and less important parts of the machine,—separately less important,—we at present shall confine our attention to the highest and noblest part, the office of the Lord Chancellor himself.

Now when the man whom the king delighteth to honour is entrusted with the great seal, he immediately passes from a private station—from his practice behind the bar, like Lord Brougham—from the serene gravity of the Rolls Court, like Lyndhurst or Pepys—or from the ermined dignity of the Common Pleas, like the present Chancellor—into the routine

belonging to the following functions.<sup>1</sup> (1.) He is a cabinet minister, and must attend all cabinet councils, where his voice is of the greatest influence. (2.) He is a privy councillor, and must attend the Privy Council upon all great occasions. (3.) As a quasi minister of justice, he is often appealed to by the Secretary of the Home Department, who is frequently charged with the care of bills affecting the administration of justice—a subject which alone might well occupy the undivided attention of one individual, however able. (4.) He becomes Speaker of the House of Lords, and is required often, perhaps, by tyrant custom more than by any more direct sense of duty, to attend debates, and undergo the passive toil of hearing the policy of his colleagues attacked, or in his turn actively defending them, or the scarcely less exhausting monotony of retaining his place on the woolsack, while nature, worn out by the fatigues of the previous day, dissolves the limbs in sleep. (5.) He becomes the presiding and often the sole judge of appeals in the House of Lords, upon questions involving not only the common law and equity jurisprudence of England and Ireland, in equity appeals and writs of error, but a knowledge of the jurisprudence and practice of the Scotch law courts, distinct from ours as those of France or Germany. Nor can it be urged against the fact of his sitting thus generally alone, that the spectacle we had exhibited last August<sup>2</sup> was unusual, and that under ordinary circumstances the Chancellor is assisted by other law lords.

Of late years this has been so: and we have been willing to flatter ourselves, that what has been the result of accident, is the normal condition of the House of Lords. In consequence of the unusual oscillation of parties during the last twenty years, we have had three ex-chancellors to assist the deliberations of the noble lord on the woolsack. The presence of the political element in the title to the seals, which we affirm to be an enormous and most indefensible anomaly in the present state of society, has in this period, we admit, advantageously affected the composition of the House of Lords as a court of appeal. A system which gave us Lords Brougham, Lyndhurst and

<sup>1</sup> See Mr. Lynch's Speech, 5th August, 1840; Hansard's Parl. Deb., 3rd Sess. vol. 55.

<sup>2</sup> Let us not be misunderstood: Lord Brougham deserves all gratitude and praise for his activity, courage and learning, in undertaking and deciding the arrears then before the House. But that any extraordinary gratitude and praise is due, is in itself sufficient evidence against the present system, which fosters an accumulation of arrears, and fails to provide a judge whose business it is to dispose of them, leaving us to the accident of finding a Lord Brougham, ready and willing to undertake the task.



Campbell, in addition to the chiefs of the common law and Rolls Court, to assist the Lord Chancellor *pro tempore*, it was said, must be admitted to "work well;" and this accidental good has, we verily believe, blinded the public to the far greater evil which must necessarily in the long run result from the union of political with the judicial functions of the Lord Chancellor. But party revolutions are, apparently, reverting to their old condition of comparative rarity, and it is not unreasonable to suppose that, if no change takes place in the constitution of the appellate court, we shall recur to the typical form of an appeal, viz. a rehearing before the same judge in another place. Such it virtually was in the time of the Hardwicks and Thurlows, and up to Lord Eldon's resignation;<sup>1</sup> and such, doubtless, it would now again present, if time could damp Lord Brougham's ardour, as it, alas! seems to have fallen heavily, at length, upon some of his illustrious competitors.

In addition to the important duties here pointed out, the Lord Chancellor's attention is to be directed, as Speaker of the House of Lords and chief protector of their privileges, (6), to all peerage cases; and (7), with a somewhat more limited responsibility, to all divorce bills, private estate bills, and bills of naturalization. The quantity of business under this head is very great, amounting in the twenty years terminating with 1843, to 540 estate bills, 151 naturalization, and 81 divorce bills, besides 176 of all kinds, which were dropped at various stages, making a total of nearly 1000 cases, or nearly 50 per annum. It is true, only a small portion of the labour and responsibility attending these rests upon the Chancellor, but all fall within his cognizance and authority.<sup>2</sup> (8.) As keeper of the royal conscience and of the great seal, the Lord Chancellor has to peruse and approve of all letters patent and treaties signed by the crown, and which require the great seal to be affixed. (9.) A great deal of anxious duty is thrown upon this great official entrusted by the crown with the custody and management of the persons and properties of all lunatics and idiots. (10.) He has the disposition of a vast amount of church patronage, and

<sup>1</sup> With the exception of the assistance which he at different times had from Lords Redesdale and Gifford.

<sup>2</sup> E. g. the case mentioned by Sugden, where a private act of parliament being brought in to substantiate a title considered doubtful, Lord Eldon declared his intention to oppose the bill, as he considered it unnecessary, and as necessarily tending, if allowed to pass, to cast a slur upon other similar titles. This instance shows at once the attention which every individual case requires and receives from the Chancellor, and also that the cases which are not carried through all the stages, often involve as much consideration, or more, than those which are allowed to pass.

the appointment and superintendence of the magistracy throughout the country; a charge which often gives rise to imputations of party feeling, and to onerous and distracting negotiations and correspondence. The hours which these complicated duties have not engrossed, the energies which they have not wholly quelled, he is called upon to devote, not to relaxation of the overstrained intellect, not to the amenities of social intercourse, or the tranquillizing influences of the "balmy breeze," but in the hot close court, in the murky atmosphere of Fleet Street and Holborn, surrounded and perplexed by wrangling counsel (a puzzled Chancellor has at length been seen in Lincoln's Inn)—there he fulfils the remainder of his destiny, deciding almost irrevocably (for how few dare dispute his decree, and at the expense of what time and money, before himself again on the woolsack?) on the most important issues in the world, issues upon which rest not only the 40,000,000*l.* personal property now under the administration of the Court, not only the vast extent of landed property rights, in which are matters of litigation then, but all the property, whether money or land, and all men, whether lieges or aliens, which shall at any time hereafter, in any portion of the British dominions, be placed in circumstances similar to those of the case which the Chancellor is now deciding.

Such is a slight review of the more important of the multifarious duties cast, under the present system, upon one man. It appears almost an unnecessary investigation, to inquire any further whether any one man can fully perform them: the bare recital seems to carry conviction of the impossibility. There have not been wanting, however, grave authorities who have recorded their opinions against the only remedy, (*viz.*) a separation of those functions. Not to go back to those earlier days when faith in the fortunes of Britain did not include faith in the restoring, repairing powers of the Anglo-Saxon genius, we find in this sense Lord Redesdale's opinion in 1813, and Lord Eldon's in 1823. Lord Eldon said that, "now, at the close of his official life, he would assert that he had never known any man in the profession who had not deprecated the separation of the two offices of Lord Chancellor and Speaker of the House of Lords; against that project therefore he opposed not merely his own individual opinion, but the collective wisdom of an acute and intelligent profession." This was much to the same effect as the testimony given by Sir Charles (then Mr.) Wetherell, ten years before: "The separation had been so universally held to be inexpedient by all men *whose authority was of weight*, that it would be idle in him to repeat their reasons



for coming to the conclusions, in the propriety of which he most perfectly coincided.”<sup>1</sup> The wonderful unanimity thus experienced and described by Lord Eldon and Sir Charles can hardly be alleged to exist at the present day, unless the most rigorous interpretation be put upon Sir Charles’s words, and their authority is to be deemed of no weight who dissent from the opinion of the speaker. Though there still are many men of clear heads and long experience in favour of the present system, yet the weight of authority is now decidedly in favour of some great constitutional change, even if the reformers be not unanimous as to the exact change which may be most advantageous.

Lord Liverpool, Mr. Horace Twiss, Mr. Canning, and Mr. Peel—the latter very cautiously, and in words which would lead us to expect his support to a very radical alteration now—would that he had been spared to direct us in this, and that other approaching great question, the remodelling of our Universities!—the former more boldly, have recorded their opinions against any change. Lord Liverpool in particular, in 1823, “was most unwilling to see that high and ancient office frittered away by any regulations for reducing or dividing its duties.”—That was his notion—to abstain from placing upon one man (sometimes not the best) duties sufficient to embarrass any two men in the kingdom, was “frittering away a high and ancient office.”

Let us now see the names recorded on the other side. Out of parliament they are legion: we can only notice those who have brought forward or recommended plans of reform there.<sup>2</sup> The Select Committee of Inquiry, appointed by the House of Lords in 1823, stated as the result of their inquiry, “There is now (1823) a manifest impossibility that any person holding the Great Seal can find time for the performance of all the duties of his high office;” not naming any person; but such a statement must have been pretty keenly felt by the noble person then holding the Great Seal; who had had the address to divert Mr. Pitt from bringing forward a measure for remodelling the

<sup>1</sup> Sir Charles seems to have been of that not uncommon class of philosophers who divide mankind into two classes, “clear-headed, sensible men, with whom I perfectly agree,” or else “a set of stupid coxcombs that are always contradicting everything you say.”

<sup>2</sup> Mr. C. P. Cooper, Q. C. (who we believe claims the title of the Father of Chancery Reformers), has collected and remarked on the various schemes in very many pamphlets. We need refer to two out of the number, “The House of Lords as a Court of Appeal,” and “The Appellate Jurisdiction of the House of Lords, Privy Council, and Court of Chancery,” both published by Stevens and Norton, 1850.

office, as he at one time proposed; and who had declared that he never would give up even the Bankruptcy jurisdiction, which appeared less intimately connected with his lofty position than any other topic in his authority.<sup>1</sup> We shall see whether the alterations which have since taken place have rendered that possible in 1851 which was thus deemed impossible in 1823.

Of course in the foremost rank of those who have advocated a separation of the functions of the Chancellor, as the only means to have them usefully performed, stands Henry Lord Brougham, both before and since he has attained the coronet; though of later years, as he himself confesses, enlarged experience has led him to see difficulties great, if not insurmountable, in the path of any proposed alteration. Sir Edward Sugden, an authority surely as weighty as Sir Charles Wetherell could desire, came forward as long ago as 1830 with a scheme, if not for taking all political power from the Chancellor, at least for modifying and reconstructing the ultimate appellate courts of the country in a manner equally repugnant to the feelings of the stout old Tory. The debates of 1832, 1833, 1836, 1840 and 1841, elicited many opinions of many men: the majority, however, urging the separation of the functions, not merely as being expedient, but as being absolutely necessary. Not to mention minor authorities, Lord Langdale, in 1836, gave an admirable exposé of a plan for the entire reconstruction of the Court of Chancery and the appellate jurisdiction of the country—and Lord Cottenham on the same occasion (though the scheme which he then brought forward did not divorce the Chancellorship from the Speakership of the House of Lords), deprecating any measure which might tend to increase the duties of the Chancellor, said “The Chancellor has indeed this protection, that, unless your Lordships can add to the twenty-four hours, it is impossible that he can perform any additional duty. *In fact, it is impossible that any one individual can perform the duties already imposed on the Great Seal.*” And even Lord Lyndhurst, when he took part in the same debate, seemed not to be averse from the consideration of some such great reform.<sup>2</sup>

<sup>1</sup> When Lord Eldon made this declaration the judge was paid for the Bankruptcy business, as indeed all the other law business which came before the Chancellor, by fees which formed an item in the Chancellor's revenue of £6000. The great improvement of paying the Chancellors a fixed salary was first introduced in Lord Brougham's time.

<sup>2</sup> Lord Lyndhurst said, “It has been alleged against this Bill” (for the appointment of additional Vice-Chancellors, 1840), “that the number of appeals will be increased, and that provision should also be made for hearing the appeals.

The proof demonstrative, however, as in all cases where figures can be brought to bear, depends upon the statistics. Everybody, reformer or non-reformer, admits, that, with rare and occasional exceptions of ill health, &c., the Chancellor always does his best under the whole circumstances of the case, and that if he does not do all his work, it is only from sheer physical inability. If, then, it is found, as a general rule, that the work is not done, i. e. that the Chancellor is physically incapable to do all his work, we shall with great ease get over all the arguments about "frittering away a high and ancient office,"<sup>1</sup> "the disparagement to the bar from the loss of the reflected light which so illustrious a prize diffuses over their whole body,"<sup>2</sup> or "keeping open the passage from the court of pie powder to the woolsack."<sup>3</sup> What, then, are the statistics on the subject?

By a return to the House of Lords, dated 29th July, 1849, it appears that there were at that date fifty-nine appeals undetermined and set down for hearing before the Lord Chancellor. That at the commencement of Michaelmas Term, 1846, there had been but thirty-eight. Consequently, notwithstanding the activity and great ability of the then Lord Chancellor Cottenham, there had been a gradual growth of the arrears. Instead

Now not more than one decision in fifty became the subject of appeal—was it nothing that forty-nine causes should be disposed of? . . . If there were not sufficient force to dispose of the appeals, still it is ridiculous to use that as an argument against the present measure . . . Others, and among them men of great distinction and eminence, said they would not support a partial measure; that there must be a general reformation and review of the whole Court; that the appellate judicatory of their Lordships must be reformed or abolished; that a wide and general measure of that kind must be brought into parliament, and carried into effect. *All this was idle and chimerical.* He had heard many complaints made of the appellate jurisdiction of their Lordships' and other tribunals, but he never heard two individuals agree in a precise remedy; *to wait, therefore, for a concurrence of opinion on measures of this kind, instead of providing a practical remedy for a great practical evil, would be doing a great injustice to the country.* Here was a great practical evil, and a great practical remedy pointed out, which was effectual for the purpose, and therefore in common sense and common justice they could not oppose this measure" (Hansard's Third Series, vol. liii. p. 1351). The words above *in italics*, "idle and chimerical," have been much quoted, to show that Lord Lyndhurst's opinion declared a "wide and general measure," of the above description, to be "idle and chimerical." The whole of the context would take too much space to be quoted here; but we think it sufficiently appears from the above extract, taken altogether, that his Lordship thought it a great injustice to the country to refuse instalments of improvement, and reserved all expression of opinion upon the "wide and general measure."

<sup>1</sup> Lord Liverpool, 1823.

<sup>2</sup> Mr. Twiss, 1828.

<sup>3</sup> Mr. Canning, 1824. "Pie-powder, "*pied* or *pie poudré*," from the *dusty feet* of the suitors.—Co. Litt.

of working them off, or even keeping them at their then standard, they had been slowly, yet surely, gaining upon the overburthened judge. Twenty-one appeals had been set down for hearing before Lord Cottenham more than he had heard, or rather disposed of: a phrase which may sometimes give an inordinate idea of the work got through, since it includes appeals dropped or in any manner got rid of, the number of which generally varies directly according to the delay, and therefore inversely according to the work done. There is not, that we are aware, any return of more recent date than the above; but inasmuch as half the interval has been filled up by Lord Cottenham's illness, and nearly another half by Lord Truro's presence in Lincoln's Inn, it was but natural that the appeals should have increased. And notwithstanding Lord Truro's industry they have increased. No less than seventy-seven appeal cases appear in the cause lists for this Hilary Term, 1851, showing a further growth of arrear of eighteen causes in as many months.<sup>1</sup> Moreover, if we cast our eyes upon the nursery whence this appeal list is supplied, we shall see cause to expect a still more rapid increase of appeals. The course of legislation during the last two sessions has been eminently calculated, and with all justice, to facilitate and encourage access to the inferior courts of equity. The Winding up Acts, Mr. Geo. Turner's Act, Mr. Headlam's Act, and above all, perhaps, the orders of the 22 April, 1850, have rendered the means of instituting a suit cheap and simple. The alterations in the Masters' offices have much tended, and will perhaps still more tend, by expediting and cheapening the progress of a suit, to an increase of business in the Vice-Chancellor's courts. Now the appeal business of the Lord Chancellor's court cannot but be increased by anything which throngs the Vice-Chancellor's. The suits above are in fact a per-centage of the suits below. And we find, that whereas the whole number of causes disposed of from 1759 to 1764 was but 383 per annum; from 1799 to 1804, 501 per annum; from 1807 to 1812, 562; from 1819 to 1824 (the Vice-Chancellor had been appointed in 1813), 959 per annum; and from 1834 to 1839, 1249 per annum;<sup>2</sup> the number in two years and three-quarters, from Michaelmas, 1846, to July, 1849, was 4583, or about 1700 per annum. This, distributed amongst five equity judges, does not give so much to each as were disposed of by Lord Hard-

<sup>1</sup> And it does not appear probable that the present Lord Chancellor will be able greatly to diminish this arrear, or even to arrest its rapid growth. We have not the means of ascertaining exactly, but we apprehend that it will be found Lord Truro has not disposed of more than some half dozen causes since his appointment upwards of six months ago.

<sup>2</sup> Lord Cottenham, Hansard, 3rd Ser., 11th May, 1840.

wick. In particular, the Lord Chancellor appears to have disposed of 230 appeals in the three years. But a great deal of matter now comes before the judges by petition,, &c. which was then excluded; and probably a greater proportion of those "disposed of" are heard now than formerly, when, through delays, &c., many dropped. The number of appeals to the House of Lords also has increased from an average of ten per annum in Lord Hardwick's time to upwards of fifty per annum now, throwing much additional work on the Chancellor. The number of causes set down at the commencement of this Hilary Term, 1851, is about 500 before Vice-Chancellor Knight Bruce, 200 before Vice-Chancellor Lord Cranworth, and 160 before the Master of the Rolls.<sup>1</sup> The number of bills filed in the same period, since July, 1849, before each branch of the court we have no means of ascertaining; but the Winding-up Acts have been a fruitful source of occupation both to the Vice-Chancellors and to the Lord Chancellor, and even the House of Lords; and the suits instituted by claim must alone be very numerous, probably sufficient to engage the whole attention of the inferior judges, and therefore such as to render the appointment of an additional Vice-Chancellor advisable; and any such measure would evidently accelerate the march of the appeals which already too numerous throng the vestibule of the Lord Chancellor's court.

The statistics, then, of the case show, that in this very important duty (though not of greater importance than many other duties), namely, presiding as a judge of appeal in the Court of Chancery (for it has been but once—by Lord Cottenham, 1838—faintly and occasionally attempted since the Vice-Chancellor's Act, 1813, to exercise an original jurisdiction) is not adequately performed. It will be admitted by all parties that the duties are absolutely necessary to be performed, and that the severest efforts are conscientiously made by the Chancellor to perform them: still they are not performed; it seems to follow that it is a matter not of expediency, but of necessity, to separate the functions at present devolved upon the Lord Chancellor. We may be reluctant to take such a step—it may be "a pity" to separate the glories of the woolsack, the seals and the head of the law—but it is as reasonable, to use Lord Cottenham's figure, to lament it as a pity that we cannot make the Chancellor's day consist of forty-eight hours, as that we cannot make one man do the work of two or three.

Assuming it then as proved, that some change is necessary, the much more large and difficult investigation remains as to the

<sup>1</sup> We believe the whole number of causes now set down for hearing (22nd January) amount to upwards of 1000.

nature of the alteration. The opposing party here find their advantage,—the assailants separate into various parties and attack each other; and those who would maintain the existing system stand on the difficulty of selecting a substitute. “Open,” they say, “since you deem it necessary and inevitable, open this Pandora’s box; you will find all sorts of evils emerge which you have hitherto not even imagined, and can after all only have a bare hope remaining of finally overcoming what you will have let loose.” But this language and conduct is very similar to that which Lord Lyndhurst condemned in 1840.<sup>1</sup> It is unreasonable to require a strict *à priori* proof that any proposed system will certainly be unaccompanied by all difficulties. So intricate a problem cannot be required to be so accurately solved. It will be sufficient to show that the proposed alteration will provide a remedy for the existing evil, and not involve any other evil of nearly the same magnitude. And this condition, we think, may be fulfilled by more than one of the plans which have been advocated in and out of parliament: the principal of which we shall now shortly lay before our readers.

Before enumerating these projects, however, it may be proper to observe, that the evils arising from the multiplication of duties devolving on the Chancellor are not confined to those felt by suitors in the Court of Chancery, though, as no other evils are so immediately or so directly felt, it is to be apprehended that these will be the immediate occasion and ground of any change; and that the change, when it comes, will therefore have these evils chiefly in view, and be mainly intended to obviate these alone: a course carefully to be guarded against. The result of the present appellate system in the House of Lords is another evil intrinsically just as great, although not so extensively felt, or at least so directly felt. Yet by a circuitous action, influencing, as these ultimate decisions must, the rights of all other litigants under similar circumstances, they are perhaps in the end more generally felt than the others. Nor is the present appellate system to the Judicial Committee of the Privy Council by any means perfect, although a vast improvement on what it replaced. The want of a permanent official head, and permanent official Lords Assistant, is felt now as much as Lord Langdale felt it in the House of Lords.<sup>2</sup> And of more extensive social importance possibly than any of the foregoing objects, would it be to have a high ministerial officer who should have the charge and responsibility of acts of parliament (those at least directly affecting the law), and time and opportunity suf-

<sup>1</sup> *Ante*, p. 39, n.

<sup>2</sup> Lord Langdale, Hansard, Parl. Deb., 3rd Ser., vol. 53, p. 1363, 11th May, 1840.



ficient to preserve that charge and responsibility from being more than a farce.

The appointment of such an officer would relieve the secretary for the Home Department, and also the attorney and solicitor-general from duties for which the first is not peculiarly qualified, and none have well time to attend to. And it has been suggested, pertinently enough in regard to the contemplated abolition of the Irish lord lieutenancy, that that abolition will necessitate either the appointment of a fourth secretary of state for Irish affairs, or else some reduction of the duties of the Home Office: which may, it is submitted, be best effected by the appointment of some such officer as referred to: either under the title of secretary of state for Affairs of Justice, if the term "Minister of Justice" seem too anti-national: or, as Lord Langdale proposed,<sup>1</sup> under the old English title of Lord Keeper.

The various plans which have been suggested for effecting these most desirable objects, or so many of them as were thought capable of being combined, are stated by Sir Edward Sugden in the introductory chapter to the "Law of Property in the House of Lords." We need offer no apology for placing before our readers portions of an abstract by so eminent a hand (see pp. 44—47, 52.)

"In the year 1830 the writer" (i. e. Sir E. Sugden), "with a view to impose a check upon improper appeals, suggested a court, to be called a Court of Equity Exchequer, to be composed of the Lord Chancellor, a new judge to be appointed, the Vice-Chancellor, and the Lord Chief Baron. The court being thus constituted, he would give the appellants the option to go before three of these judges, who had not before heard the cause, before the Lord Chancellor and two of the other judges, or before the other three judges, or go to the House of Lords; the Lord Chancellor to have the power to call one of the equity judges to his assistance in cases of appeal in the House of Lords.

"In 1833, Lord Brougham, Chancellor, laid on the table of the House of Lords a bill for appointing a chief judge in chancery, and for establishing a court of appeal in chancery, the new judge to be in effect Lord Chancellor in that court; the new court to be an equity exchequer chamber, consisting of the Lord Chancellor, the new judge, the Vice-Chancellor, and the Chief Baron of the Exchequer, with a limited right of appeal to the House of Lords. The Lord Chancellor's political functions and the appellate jurisdiction of the House were reserved; but this bill was dropped.

"In 1834 the plan proposed by Lord Melbourne's government had these leading provisions: 1st. All appeals which the House of Lords should direct were to be heard by the Judicial Committee of the Privy Council, who were to report to the House, and the Lords were to be

<sup>1</sup> Ubi suprà.

at liberty either to affirm or not the report, and either with or without any hearing of the case; but no parties in any proceeding before the Judicial Committee were to be at liberty to apply for a rehearing before the House of Lords. 2. The Lord Chancellor, or Lord Keeper of Ireland, being a privy councillor of England, and any person who should have held either of such offices, was to be one of the Judicial Committee. 3. The crown was to have the power to appoint a vice-president of the Privy Council, to hold office during his majesty's pleasure; but his majesty was to be bound to select such vice-president from peers who should have held the office of Lord Chancellor of Great Britain, or of Lord Chancellor of Ireland, or of Lord Chief Justice of the King's Bench of England, and the Judicial Committee were to have the powers given by the 3 & 4 of Will. IV. And, 4. Power was proposed to be given to the committee to require the attendance of the judges of the King's Bench, Common Pleas or Exchequer of England, or the Court of Session in Scotland, not being members of the Privy Council. 5. No appeal was to be heard, unless in the presence of the Lord Chancellor of Great Britain, or of the Vice-President of the Privy Council, or of the Chief Justice of the King's Bench, or of the Lord Chancellor of Ireland.

“In the year 1836 Lord Cottenham proposed his plan to the House of Lords. The plan was to appoint a chief justice in Chancery during good behaviour, to hear appeals and original causes. He objected to all appeals going direct to the House of Lords; the Lord Chancellor to hear appeals both in the House of Lords and in the Judicial Committee of the Privy Council. The House was to have power to sit to hear appeals after a prorogation, and also a power to call in the equity judges. To this plan of separating the office of Lord Chancellor Lord Lyndhurst objected. Lord Langdale, Master of the Rolls, advocated the following plan: 1. The Lord Chancellor was not to hold the great seal, but to be created by letters-patent, and confined to judicial functions of original jurisdiction in the Court of Chancery. 2. There was to be a Lord Keeper, with the great seal, and with all the political functions, but without any judicial power. 3. The House of Lords was to be the court of appeal for all, with permanent judges, consisting of a Lord President and Lords Assistant. 4. The King was to have power on the address of the House to extend the time of sitting to hear appeals, notwithstanding a prorogation or dissolution. 5. It was to take the appellate jurisdiction of the Judicial Committee of the Privy Council. Lord Langdale disapproved of a double appeal. There might be a rehearing before the same judge; but an appeal ought to be to a different judge.

“In the early part of 1841 the writer” (i. e. Sir E. Sugden) “proposed in the House of Commons a plan for improving the appellate jurisdiction. He moved certain resolutions, and embodied his scheme in a bill, both of which were read a second time, but without any expectation that they would pass into a law. The objects were to abolish the Court of Review in bankruptcy (since accomplished), and to abolish the Judicial Committee of the Privy Council, and to re-



model the courts, and to add to the Court of Appeal in the House of Lords two judges, to be appointed during good behaviour, and, as proposed by Lord Langdale, to be called Lords President, but not necessarily to be peers, and that these Lords President should act as judges with the Lord Chancellor during the hearing, and openly deliver their judgments, but not have voices if not peers. The House to sit, if necessary, notwithstanding prorogation, and to have the power of summoning equity judges upon the hearing of appeals. It was further proposed that the two Lords President should sit and hear the matters then referred to the Judicial Committee of the Privy Council, with power to call to their aid any other judge, except the Lord Chancellor, and that the Lord Chancellor might attend, upon their request, if he should think proper: and that if the two Lords President should sit alone, and not agree, the case should be adjourned for the assistance of the Lord Chancellor, by whom and the two Lords President the case should be disposed of.”<sup>1</sup>

Since the year 1841 there has nothing of consequence been attempted or suggested, except Lord Brougham’s most undeserved failure, some years back, to create an official head of the Judicial Committee of the Privy Council, and the speech of the same noble and learned lord last June (published by Ridgway), and his letter of August last to Lord Denman, in which he seems almost baffled by the repeated failures he has experienced from the state of public feeling, and the intrinsic difficulties and perplexities of the subject.

Every one of these various schemes has, therefore, supporters of the highest authority; every one also is opposed by authority even greater (taking cumulatively) than that by which it is supported. In such a case, so balanced, the Houses of Parliament will probably choose for themselves, with more or less of forethought; but the truth does really seem to be that the whole results of any scheme can so little be appreciated, that a great deal must be left to chance: and this at least we may foretell, that, whether any alteration, or none, be adopted, we shall have an unusual, or the usual, number of prophets after the event.

It does, however, appear to us, that Lord Langdale’s plan in 1836 is the only scheme which proposes more than a partial remedy. Some schemes almost wholly confine themselves (as Sir E. Sugden’s in 1830, and Lord Brougham’s in 1832) to the state of appeals in the Court of Chancery: others, as Lord Cottingham’s in 1836, and the vaguely-mooted schemes of 1834-5, have also prominently in view the ultimate appellate jurisdiction of parts at least of the empire: but Lord Langdale’s alone seems to embrace, in addition to the provision for due hearing of

<sup>1</sup> Sugden, *Law of Property in the House of Lords*, pp. 45—52.

causes in the highest branch of Chancery, a full provision for the ultimate decision of appeals from every court at home and in the colonies, or to devote any consideration at all to that very important subject, to which the repeated and extraordinary legislative errors of the present generation daily call our attention with louder and louder voice (*viz.*), the appointment of some high officer of state who shall have the care of the construction of acts of parliament, at any rate of those acts which more immediately affect the theory or administration of the law. In addition, it is not, in our opinion, one of the least important of the improvements proposed by Lord Langdale, that the court of ultimate appeal should be one, not two, as at present (*viz.* the House of Lords and the Privy Council). In the multitude of councillors there is safety: but in the unity of courts there is a greater certainty of preserving uniformity of decision. To this we apprehend may be attributed the harmony and consent of our judicial decisions, so different from the contradictions, *e. g.* in France, where thirteen “*parlemens*” in different districts formed so many independent courts of last resort.<sup>1</sup> Nor can we see much force in the objections commonly, but as we conceive ignorantly urged, (*viz.*) that the systems of jurisprudence which govern the decisions of the House of Lords and the Privy Council being different, are best administered in distinct courts, and by different judges. The systems of jurisprudence are not different, if we except the Indian appeals: each tribunal is in its turn called upon to decide upon common, statute, and civil law. And the judges who have had most weight in the Privy Council, have either been also peers, as Lords Campbell, Brougham, Langdale, or else such commoners, Knight Bruce, Pemberton Leigh, Mr. B. Parke, as would throw greater lustre upon the peerage than the peerage could throw upon them.<sup>2</sup> Lord Langdale’s plan therefore, rightly, as we think, proposed that there should be but one court of ultimate appeal, not two independent courts, which might, by adopting different views, give rise to a most inconvenient conflict of law. But we differ from Lord Langdale, though with great hesitation, as to the hands to whom this last appeal ought to be committed. His lordship would take the whole appeal business to the House of Lords; we should prefer to see it entrusted to the Judicial Committee, or rather to some one tribunal constituted as the Judicial Committee is; but, not attributing the judicial power to the

<sup>1</sup> The evils of such a system led to the establishment, as our readers are aware, of the *Cour de Cassation*.

<sup>2</sup> Sir Edward Sugden is another of the same stamp, but, we believe, has never been an attending member of the Judicial Committee.

monarch in council, but to the tribunal itself—not even the name need be retained. The Lords President and Assistant might, together with the *emeriti* of the profession, constitute one grand Imperial Supreme Court of Appeal.

The question is to be argued, we apprehend, chiefly on two grounds; 1st, on constitutional grounds: 2dly, the convenience to the suitors. No reasonable fears can be entertained that either one tribunal or the other would not be perfectly of competent ability to examine and decide almost any question which the wit of man could devise. But the main ground of objection is the very great constitutional changes which, it is asserted, such an alteration would effect; as first, tearing this jurisdiction from the unwilling grasp of the House of Lords; then impairing their influence and dignity by abstracting from them all that quasi imperial judicial authority; and so most perceptibly paving the way for the downfall of the second estate in the realm, and, by the same stroke, most dangerously increasing the prerogative of the crown, and retracing much of the ground towards the reconstitution of the hated Star-Chamber, which it cost so much time and energy of our ancestors to abolish, and so tending again to a revival of the struggles which turned the best blood and spirits of Englishmen to gall and bitterness.

The judicial authority of the House of Lords is often spoken of, and that by the greatest authorities, as part of the constitution of our country. Lord Redesdale, in the debate on the Vice-Chancellor's bill (1812), said, "Either this bill must pass, or else your lordships must renounce their appellate jurisdiction. Which of these is the most constitutional course, it requires no argument to point out." But with all deference, as both courses appear to us perfectly capable of being entered upon with constitutional sanctions, the one no less nor more than the other, it does seem to require some argument to point out which is the most so. The judicial authority of the House of Lords is part of the constitution of the country just in the same manner as the 10*l.* householder clause is part of the constitution of the country, and the window tax, and the game laws; and for the same reason, and no other (*viz.*), because it is sanctioned directly, or by necessary implication, by the legislature in parliament assembled. Indeed, the game laws are very much older, and did at one time form an essential part of the constitution. Modern legislation has modified them; but there is no epoch in our history when there were no game laws, and at one time, under the title of forest rights, they involved the whole prerogatives of the crown and the liberties of the subject; but we can very readily point to the time when there was no appellate jurisdiction in the House of Lords, and very readily also to the time when it was exercised

in defiance of all law or custom, though most usefully for the liberty of the nation, and for the restraint of tyranny. In fact, it has not been a really lawful court for much more than a century.<sup>1</sup> The same authority which established it can remove it with equal observance of the constitution, upon a proper case being shown. Then, it is said, this removal will endanger the existence of the House, which derives so much of its dignity and lustre from its judicial authority. The House will certainly stand as long as it is of use; and long may it stand! But we do not think so meanly of the House, as to think that it would desire to stand merely for the sake of standing, or when all its possibility of usefulness was at an end. If it can be shown that these judicial functions can be performed elsewhere with greater benefit to the commonwealth, we will not believe the House to be so wanting in patriotism as to refuse to abdicate this power of a century's growth. Neither do we think so meanly of the House of Lords, the noblest senate of the earth, as to deem that appellate jurisdiction the noblest or most lofty of its functions. Other functions remain behind; political, legislative, social, of a higher grade surely than examining or explaining the meaning of obscure and possibly obsolete customs or sentences. Nor in fact is this judicial authority a high privilege which noble lords seem very anxious, practically, to retain,—nor is it in fact exercised by the peers generally. On the contrary, instead of a high constitutional trust and privilege, they seem to regard it as a bore and a nuisance. Two devoted peers attend in rotation under a 50*l.* penalty; but their bodily presence is all that is required; they may divert or occupy themselves with any entertainment or business other than the dry appeal before them. One pair of peers attends at the opening, another pair at the reply; anybody, or nobody, at the judgment, at which, by nearly unbroken custom, only the “law lords” vote. So that the peers generally do in practice transfer this tremendous prerogative, the loss of which would, it is said, dim the lustre and sap the foundations of their House, to one or two of their number,—often to a smaller number than are sitting as members of the Judicial Committee. This has often been called a mockery; it is beginning to be generally esteemed to be a mischievous mockery into the bargain. It need scarcely be pointed out that to retain the practice of a mischievous mockery must detract from the

<sup>1</sup> It was not until the year 1726 that the jurisdiction of the House of Lords on appeal was completely established. However, several acts of parliament have been since passed, which must be taken to acknowledge that the House of Lords are fully entitled to the privilege they enjoy.—C. P. Cooper, “House of Lords,” Pamphlet, 1850.

reputation and even endanger the existence of the House, much more than to provide for the best possible exercise of this very important function.

Then again, as to the danger to be apprehended from the overconfidence of reposing in the Privy Council of the crown as the tribunal of last resort, and the impolicy of granting so large a prerogative, which may be turned to the worst purposes of tyranny by an ambitious monarch,<sup>1</sup> it may easily be answered that no derangement of the balance of powers exhibited by our constitution is at this day to be anticipated on the part of the crown. The encroachments are all from the other side. In the course of the last century and a half, or somewhat more, we have run the entire circle of points from whence disturbance of that balance can possibly arise. The efforts towards absolute monarchy having been successfully repressed, we hope once and for ever, at the Revolution, the aristocracy in turn became predominant; but in its turn has been overpowered by the democratic element. It is certainly this latter which has since the late war gradually been increasing its relative strength, and its ambition even beyond its strength. It is not now that we can pretend to dread the assumption of arbitrary power by the monarch; it is not now that we need be troubled by apprehension of any such consequences from transferring the supreme appellate jurisdiction to the Privy Council, acting under the advice of the Judicial Committee, far less from the tribunal we propose to be established, which would in fact be composed of all those members of the House of Lords and of the Privy Council who take any part in the hearing of appeals, and of such other members as the crown might think fit to appoint; the appointment to continue during good behaviour, and the whole authority of the tribunal being derived, not from any fabulous privileges of parliament, nor from any special prerogative of the crown, but from a source which all must acknowledge to be strictly constitutional, viz. an act of parliament.

No such act of parliament, however, can at present be hoped for. Lord Langdale admitted in 1836 that the public mind was not prepared for his scheme. It is only too probable that the public mind is still less prepared now for that modification of his scheme which we have suggested. We think this would be the best; but the least eligible of all the schemes mooted since 1830, and referred to above, would be a vast improvement upon the present system, the inefficiency of which is more and more fully established by every change of Chancellor, whether from better

<sup>1</sup> This danger is insisted on (among others) by Sugden in his Letter of 1835, and Lord Lyndhurst, 1836. See too Sugd. H. of Lords, p. 47.

to worse, or vice versâ. When an efficient Chancellor succeeds an inefficient upon the woolsack, we condemn the system which retained the other there so long; when an inefficient Chancellor is appointed, we condemn the system which places him there at all. Each of the schemes which we have mentioned has some peculiar advantage, the lack of which shows as a disadvantage in its rivals; and it is this competition of advantages, rather than the alternative of inconveniences, which makes the choice so difficult. Keeping in view the many objects in which we deem reform necessary, and the manner in which all these objects are complicated together, we think one measure might embrace them all; and that that measure is the largest, and at the same time (keeping in view the results) the simplest, which we have enumerated. But relief upon any one point would be extremely desirable; and, if we cannot get all we would wish, we shall be happy to take whatever we can get.

*B.*

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#### ART. IV.—ON THE TERM HEREDITAMENT.

Lloyd v. Bacon, 6 C. B. 90.

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IN the multifarious technicology of the law, perhaps no term more frequently strikes the lawyer's eye than hereditament, yet a precise definition of it is anything but obvious. It is true, every one is aware of Lord Coke's statement, that "whatsoever may be inherited is an hereditament, be it corporeal or incorporeal, real, or personal, or mixt" (Co. Litt. 6); but the practical question occurs, whether all hereditaments must be things inheritable? And such is the absolute dearth of learning on this head disclosed in the usual books of reference, as Viner, Comyns, &c., and so little that is satisfactory is to be found, we believe, in any single book of authority in the law, that we are tempted, hoping that the inquiry may yield something of utility, if not much of attraction, to lay before our readers a more full examination of what we deem the law on this subject, than they will meet with elsewhere. The immediate inducement to this was presented by observing in the last case, we believe, in which the subject has been alluded to, and which is named at the head of this article, the following statement per curiam, "hereditament is defined in the text books of authority to signify all such things, whether corporeal or incorporeal, which a man may leave to him and his heirs by way of



inheritance, and which, if they be not otherwise bequeathed, come to him which is next of blood, and not to the executors or administrators, as chattels do," referring to *Termes de la Ley*; Co. Litt. 6 a; 16. Now with respect to *the text books of authority*, we think we may assert that no other text book of authority, except Cowell's *Interpreter*, and no other court or judge has ever before put forth or sanctioned the above explanation; the passage from Co. Litt. 6 a has already been cited, and as to Co. Litt. 16, all that is there said relates exclusively to the meaning of *inheritance*, a very different matter, as it would appear. For Lord Holt's opinion, in *Smith v. Tindal*, 11 Mod. 91, that hereditament is synonymous with inheritance, is said to be exploded in one text book of authority,<sup>1</sup> and in another it is laid down to be "clear that the word inheritance will carry the fee; Lord Holt seems to have considered the word hereditament to be equivalent, but it is established that a devise of hereditaments will carry only an estate for life;"<sup>2</sup> and "although the older authorities speak of incorporeal *inheritances*, yet there is no doubt but that the principle [that they lie in grant] does not depend upon the quality of interest granted or transferred, but on the nature of the subject-matter; a right of common, for instance, which is a profit à prendre, or a right of way, which is an easement, or right in nature of an easement, can no more be granted or conveyed for life, or for years, without a deed, than in fee simple."<sup>3</sup> It is true, that the use of the word in Lord Coke's doctrine of a personal inheritance, which has been fully adopted in the courts of equity, who have held that an annuity in perpetuum, granted by Charles II. to A. and his heirs, payable out of the coal duties, though it descends to the heirs, is personal and not real property,<sup>4</sup> seems to approach nearer to the true signification of hereditament; but on the whole we think no candid mind can long maintain much doubt that the two terms represent things essentially distinct. But it will show this still more clearly, perhaps, to point out expressly that things may be hereditaments which cannot of themselves be inheritances; thus a right of action has been held to be an hereditament,<sup>5</sup> and held to be so after an argument to the contrary from Serjeant Williams, each of whose arguments, like those of

<sup>1</sup> 2 Powell, *Devises*, by Jarman, 419.

<sup>2</sup> 2 Jarman, *Wills*, 190.

<sup>3</sup> *Wood v. Leadbitter*, 13 M. & W. 842, 843. *Seymour's Case*, 10 Rep. 97 b, fully explains what an estate of inheritance is.

<sup>4</sup> Co. Litt. 144 b, 374 b; *E. of Stafford v. Buckley*, 2 Ves. sen. 178; *Lady Holderness v. Lord Carmarthen*, 1 Bro. Ch. Cas. 377; *Radburn v. Jervis*, 3 Beav. 450. Vid. *Wms. Exors.* 688, 4th edit.

<sup>5</sup> *Smith v. Coffin*, 2 H. Bla. 444, 462.

Sir William Follett, firm, compact, massive, remind one forcibly of the workmanship of the poet's celestial artisan—

Εν δ' ἔθετ' ἀκροθετῶ μεγαν ἀκμονα, κοπτε δε δεσμούς  
'Αρρηκτους, ἀλυτους, ὁφρ' ἐμπεδον αὐθι μενοειν.  
Odyss. Θ. 274.

Again, it is declared generally, “there are certainly hereditaments which may be made to descend from ancestor to heir that do not in any degree affect the realty, as personal annuities and offices not having any concern with land.”<sup>1</sup> It has even been pronounced that “*hereditaments is a general term for every possible description of property.*”<sup>2</sup>

Let us however endeavour to see whether an accurate discrimination between the words may not be realized.

Our law, resting to appearance and at first view on usage and prescription for its foundations, being, in the idea of those who, like many English lawyers, never care to go beyond its walls to ascertain its origin, what Chrysostom calls the Law of Nations, *εὐρημα βίου και χρόνου*, that is the product of time operating on English experience, has nevertheless, there can be little dispute, become cemented in parts, and in parts wholly constructed by and with materials derived from the Roman law. It is natural, therefore, to turn to that deep mine of legislative wisdom to try if in this case, as in so many others, reasons can be found for that which, in our system, seems capricious and empirical. Now we find a great lawyer<sup>3</sup> stating in argument that “the civilians defined *hæreditas* to be what a man inherits; *hæreditamentum* is used to express what a man transmits;” and this seems to be substantially correct, it being borne in mind that the latter term was not known to the Roman law, which however defined *hæreditas* to be “*successio in universum jus quod defunctus habebat tempore mortis.*”<sup>4</sup> Coming down, indeed, to feudal times, we find the term *hæreditamentum*, and it is defined “*id omne quod jure hæreditario ad hæredem transit ac præsertim res immobiles,*”<sup>5</sup> an explanation which, it must be said, goes far to render identical the meaning of the two terms; but nevertheless we repeat the above distinction will be found substantially correct. At any rate, it is coincident with the law as laid down by Mr. Preston in his edition of Sheppard's Touchstone, where, in speaking of hereditaments,<sup>6</sup> he says, “a mere personal thing,

<sup>1</sup> Per M. R. in *Buckeridge v. Ingram*, 2 Ves. jun. 663.

<sup>2</sup> Per Sir L. Shadwell, V. C. E., *Harris v. Davison*, 15 Sim. 134.

<sup>3</sup> Mr. Baron Wood, when at the bar, in *Denn v. Moor*, 1 Bos. & P. 561.

<sup>4</sup> Gains, Dig. Lib. 50, tit. 16, leg. 24; and so Calvin, Lexic. Jurid. in voc.

<sup>5</sup> Du Cange, Spelm. Gloss. in voc.

<sup>6</sup> 1 Prest. Shep. T. 91.



as an annuity, may be an hereditament, though held for a chattel interest, or an interest merely of freehold, *when that interest is carved out of a larger estate which is of inheritance.*" A corody seems a good instance in illustration; for the grant of a corody was always considered the grant of an hereditament, which, from its nature, it could only be as being something carved out of the estate which the grantor had in it. Therefore, speaking of the grantor, he might be said to have the inheritance in the corody, that is, the right of presenting in perpetuum to it; speaking with reference to the grantee, the proper term to use was hereditament, of which, viz. the estate in the corody for his life, he was the recipient under the grant, which agrees with Mr. Baron Wood's distinction. So it is laid down "*hereditaments* is applicable not only to lands and tenements, but to some of the subjects of personal property, and to mere rights which imply a privation of property."<sup>1</sup> Hence it is that rent, which is an incorporeal hereditament, may be granted for an estate for life or for a less estate, without losing its character as such,<sup>2</sup> and a man may have an estate for years or at pleasure in an office, which is an incorporeal hereditament,<sup>3</sup> and which, in either case, remains so, and must therefore be granted by deed, and can only be held under deed, even in the last case.<sup>4</sup> The construction which has been put upon the word in numerous cases of devises, seems to agree with the same distinction, as may be found from many other authorities than those cited below, which, however, are some of the leading cases,<sup>5</sup> for hereditament has been held—and this is now quite well established—to carry not the fee, but an estate for life, or for a less interest under circumstances.

The result then of the above remarks, which we venture to submit, is, that hereditament is the generic name used by the law for an estate of whatever duration or quality which is carved out of the inheritance, meaning by the inheritance such estate as goes to the heirs in case of individuals and in succession in case of corporations; and having offered this definition, we will proceed to spend a few more words in applying it, by way of test of its strength, to the elucidation of a subject which is curious, certainly anything but hacknied, and on which the state of the cases presents at first sight, complicated and ravelled and entangled as they look, very much the idea conveyed by

<sup>1</sup> Burton, Compend. p. 2; vide 1 Prest. Estates, 14.

<sup>2</sup> 1 Spence, Eq. Jurisd. of Court of Chan. 150, 151; Co. Litt. 150 b.

<sup>3</sup> 2 Bla. Com. 36.

<sup>4</sup> Per Powell, J., Gatton v. Milwich, Salk. 536.

<sup>5</sup> Dyer, 351 a, 323 b; Salk. 239; 2 B. & P. 252; 3 T. R. 357; 2 Scott, 738. And see Co. Litt. 374 b; stat. 32 Hen. VIII. c. 2, s. 1.

Dr. Johnson's definition of a net, viz. "a texture woven with large interstices, or meshes, used commonly as a snare for animals," we mean the head or department of "offices." The subject is of manifest interest in connection with the rights, &c., of municipal, railway, and some other corporations, and it is within our own knowledge, that difficulties have been felt in such cases, which we trust the remarks we are about to make may be found to indicate the means of solving. One of the meshes is contained in the question, when an appointment to an office must be made by deed, and when it may be good by parol, and the "animal" who ventures upon this field of study finds himself forthwith netted in the leading case on this subject, where the Court of Common Pleas decided the matter one way very solemnly, then the Court of King's Bench as solemnly reversed their judgment, and ultimately the House of Lords restored the judgment of the Common Pleas;<sup>1</sup> but after all, the decision seems rather to have rested on the particular circumstances of the case, than to have laid down, with as much distinctness as might be wished, the general principle upon which it might, we believe, be rested. The question was, whether the *Custos Rotulorum*, on appointing to the clerkship of the peace, might do it by parol, or whether it must not be by deed? Now, alluding to what has been said, the reader will, we think, be in a condition to reply at once, that there being no interest conveyed out of the inheritance, the clerk of the peace not being paid by fee, or salary, moving from the *Custos*, who departs with nothing and divests no interest, and gives no right of action as against himself by the appointment, therefore no incorporeal hereditament is transferred; it is a mere nomination to an office, and therefore may be made by parol, just as the parson nominates by parol, in circumstances precisely analogous, to the office of parish clerk. That in such cases no estate passes out of the appointor may be seen from this, that in some of them (as, for instance, where the Lord High Admiral, who holds office during pleasure, appoints the registrar, who holds for life<sup>2</sup>) the estate vested in the appointee is the greater of the two, and the rule is general, that a man cannot grant more than he has himself.

Another "mesh," though of less strength, has probably heretofore teased some of our sessions friends in relation to settlement questions, viz. to ascertain precisely what is an office,

<sup>1</sup> Owen v. Saunders, 1 Lord Raym. 158; 12 Mod. 200; Salk. 467; Reported in Dom. Proc. in Colles's Parl. Cas. 70; and see 4 A. & E. 809.

<sup>2</sup> Hunt v. Ellisdon, Dyer, 152 b. And see per Treby, C. J., 1 Lord Raym. 164; per Lord Brougham, in Earl of Rosslyn v. Aytoun, 11 Cl. & F. 746.

and who an officer. Lord Ellenborough laid down that every office must be derived either mediately or immediately from the crown, unless created by statute,<sup>1</sup> which would exclude a parish clerkship, which is elsewhere said to be an office at common law,<sup>2</sup> and has been held to be an office conferring a vote at elections of county members, &c. &c., but however this may be, the test of whether the grant of the place in question is the grant of an incorporeal hereditament, as above stated, will probably be found to solve the doubt in all cases, it being borne in mind that the essence of an office is the salary or fee, not the duties, for they may be dispensed with or suspended from, but in all cases the salary must nevertheless be paid during the term which the grantee has in the office.<sup>3</sup> The same consideration, as it seems, might be applied with advantage to those cases in which officers of corporations have proceeded against them for salary, and the difficulty has been that their appointments, treated as contracts, were not under seal; for wherever the appointment, as it is called, conferred the right of claiming a salary from the corporation, there the appointment properly operates, not as an appointment, nor as a contract, but as the grant of an incorporeal hereditament, and must therefore in the case of an individual grantor be under seal, although the office were only during pleasure, and of course in the case of a corporation, which must do every act under seal that an individual must do under seal.

With these remarks we for the present quit the subject, which, however, is far from having been exhausted by what has been said.

<sup>1</sup> *R. v. Mersham*, 7 East, 167—174.

<sup>2</sup> *Salk.* 536.

<sup>3</sup> *Co. Litt.* 233 b; per Lord Nottingham, C., *Slingsby's Case*, 3 Swanst. 178, note.

*S. P.*

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## ART. V.—CODES OF MERCHANT LAW.

Commercial Law, its Principles and Administration; or the Mercantile Law of Great Britain compared with the Codes and Laws of Commerce of various Mercantile Countries. By Leone Levi, Author of Chambers and Tribunals of Commerce, &c. in Liverpool. Vol. I. 4to. William Benning and Co., and Simpkin and Marshall, London; and T. and T. Clark, Edinburgh.

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**W**HEN we first glanced at this volume, we imagined that that which M. St. Joseph's "Concordance entre les Codes de Commerce Etrangers et le Code de Commerce Français" is to the lawyers and merchants of France,—such the work before us was designed to be to us. A very slight inspection, however, showed that Mr. Levi's ambition was far less limited.

The object proposed by him is not only to collect, condense and collocate the commercial law (under each of its separate branches) of England and sixty foreign countries, but, to use his own words, "to review all commercial laws now in force,—to compare their respective merit, and to exhibit their conflicting results. It will include the comprehensive work of the legislator, the learned discriminations of the jurist, and the careful digest of the commentator; it will present the union of theory and practice, and the basis of those great principles upon which all laws are founded." Nor does the author stop here. His work is "to illustrate the political, economical and moral state of each country;" and by way of a collateral occupation, Mr. Levi proposes (in order to forward the adoption of a "national and international code of commerce," "and to render his labours *eminently practical* to Great Britain and to *all nations*"), to prepare a "compilation of all the leading principles of commercial law identical in every country, with a view to exhibit them in *seven languages*."

The extent to which our merchants are indebted to Mr. Leone Levi for thus kindly codifying the laws of the world, will, we trust, be duly appreciated when they learn from his preface "that commercial law in the United Kingdom, forming part of the statute and common law of the realm, is at present *for all practical purposes unknown to the majority of the mercantile classes!*"

Having introduced this mighty boon to their notice, it behoves us to impart all we have gleaned of Mr. Levi's qualification for the somewhat extensive work he has embarked upon. Mr. Levi does not appear to have had any experience of foreign

mercantile law, "but having been happily instrumental in promoting the establishment of the Liverpool Chamber of Commerce, . . . . . it (then) *became necessary* for him to acquire some correct information respecting the principles and administration of commercial law in the various countries of the world;" for which purpose "he entered into an extensive correspondence with foreign countries, and received most valuable documents, &c." These have given Mr. Levi some of his materials for his exposition of foreign law throughout the globe, and M. St. Joseph's work no small quota in addition;—a fact thus cannily adverted to in a complimentary letter from Professor More, of Edinburgh, which Mr. Levi "has great pleasure in inserting" in the front of his book;—"I see you have followed to a considerable extent the valuable Concordance of M. St. Joseph." This is quite true.

Lawyers may probably entertain an antiquated notion that, to compile a work so essentially jurisprudential, some trifling antecedent knowledge either of the principles or practice of law would be a desideratum, if not a requisite. This is, however, not so; for though Mr. Leone Levi admits, with characteristic modesty, that "the creation of a work on commercial jurisprudence by one not educated to the law, must necessarily encounter great difficulties;" yet this, as we read on, appears to be of no sort of consequence, and the profession will learn, with great pleasure, that Mr. Levi's "apprehensions are partly allayed, when he considers that neither a subtle discrimination of words, nor an abstruse arrangement of sentences, are requisite in treating of law. There is needed only a simple, clear and distinct perception of its meaning, and a lucid exposition of its requirements."

Mr. Levi much overstates what, according to his own showing, is requisite. So far, indeed, from a proper arrangement of sentences, or even a "lucid exposition" of law being necessary, a slight glance at his codification of our own law of partnership will convince the most stubborn pedant in the profession that nothing more is needed for such a work as Mr. Levi's, than a very old edition of Harrison's Digest, with scissars and paste-pot. This enables Mr. Levi to give us a bird's-eye view, amply sufficient doubtless for "all practical purposes," of the great principles of mercantile law, or, as he terms them in his preface, with admirable propriety, "*rules of court.*" As to a "distinct perception" of what our law really is, our readers may rest assured that no research whatever is required for that purpose. It can be all drawn from the marginal notes of the oldest cases, ignoring and omitting the mass of important judgments

reported subsequently to 8 or 9 Adolphus & Ellis. New lights, however, burst on old cases through the lucidity of perception, which Mr. Levi is really quite redundantly gifted with: for example, how delightful it is to discover that the case of Dickinson v. Valpy, with which we all thought ourselves so familiar, broadly decides that "a partner in a mining or farming concern has no authority to bind his co-partner," a fact which henceforth forms Article No. 83 in the New Code of our Commercial Law. Authorities are however shown by Mr. Levi to be quite superfluous. Indeed, we greatly prefer Mr. Levi's; and so we are sure will all people who hold small shares in large concerns, when they read his Article No. 33;—"Partnership of capital and labour entitles both parties to an *equal share* of it or its produce." To this axiom no authority is appended. In fact, it would only introduce "a subtle discrimination of words," were Mr. Levi to hamper himself with the precision of terms used by our punctilious judges: which he has indeed most successfully avoided. Equally felicitous is his escape from the other folly of jurists, namely, an "abstruse arrangement of sentences:" e. g. here are three consequent articles of the Code on Partnership, quite independent of any such trammels or of headings of any kind.

"97. Under Geo. IV. c. 14, payment of interest within six years by one of several joint contractors takes a debt out of the Statute of Limitations as against all.

"98. If one of several jointly interested in a cargo effects an insurance for the benefit of all, he may give notice of abandonment for all.

"99. Notice to the principal is in law notice to all agents."

Succinctness of exposition also is further exemplified by Articles 48 and 49.

"48. When a trustee admits a specific sum to be due, that is recoverable by action (Roper v. Holland, 8 Ad. & Ell. 99).

"49. When the account is once liquidated (Preston v. Strutton, 1 Anstr. 50), and the note in question given as the balance, *that must be paid.*"

The expositions of foreign law, where they are not quoted verbatim from M. St. Joseph, but appear in the genuine Levisian style, are, to say the very least, equally simple and lucid. But we are inclined to confess, if the truth must be spoken, that we attach even greater importance to the extracts our author has copied verbatim from actual codes and other authentic sources of information than to his own composition, and we expect that our merchants will enlighten their practical

ignorance of commercial law almost more from these quotations of foreign law than from Mr. Levi's own "distinct perception" and "lucid exposition" of our own law. After they have learned from Mr. Levi, for instance, that "bills of exchange, of all instruments, circulate most widely" (Preface, p. ix.); and that "a bill drawn in London or Paris may circulate from banker to banker through the continent of Europe," and have been brought to "acknowledge" that "familiarity with such laws (as Partnership) must be of great moment:" and have been made rightly to understand these and similar truths by Mr. Levi, we think they may with propriety and profit proceed to consult his compilation of foreign codes; for we can with sincerity say, that he has collected a vast mass of curious, and to a great extent useful, information on the merchant laws of the great trading nations. It is well stated in the "*Journal des Savans*" for 1842, by a French writer cited by Mr. Levi, that "there is not a banker, manufacturer, &c., however limited his affairs may be, who is not in correspondence with foreign countries, and who does not require to know the laws of other nations, either for entering into an action, in the prosecution of another, or to defend himself, or to claim against the application of such laws before the tribunals of his own country." This is, as it seems to us, the only practical utility of such knowledge and of its accurate codification for easy reference. As regards Mr. Levi's "ulterior object," on which he addresses a special letter in his book to Prince Albert for a legislative measure of "national and international commercial law," if it were not for a profound respect for Mr. Levi, we should be disposed to apply a short and characteristic epithet to such a scheme—one which was apparently suggested to Mr. Levi's mind by the Crystal Palace; for he advises the Prince, that, to realize it, "deputations should be invited to the metropolis at the time of the Exhibition with a view to consider its expediency." However expedient, is it practicable? And however willingly and readily the deputies might agree, what is to bind their governments, and what to induce them to revolutionize and uproot existing customs and laws to which the people of each country have been habituated for centuries; whereas it would require centuries to carry the new code into effect. At any rate we advise Mr. Levi to postpone the alteration of the people's laws at the Exhibition, till he sees the success of the other movement to abolish their hats, certainly the easier enterprise of the two, and we are disposed to think, upon the whole, also the wiser.

That there must naturally be some affinity between national codes, having in great measure a common origin, is undeniable;



but we suspect it is equally so, that the effect of time, of national idiosyncrasies, peculiarities and diversities of commercial produce, habits, manufacture, and even geographical position,—to say nothing of different languages, physical capacities and ethics,—have produced very considerable differences and disparities of actual and operative law ; so that an amalgamation, never practicable, is no longer desirable. The notion may be fostered awhile in the sunshine of the Exhibition, but is, we fear, destined, after it has had its day, to expire in moonshine.

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**ART. VI. — SCOTCH CONSISTORIAL LAW. — LORD  
BROUGHAM v. THE SCOTCH JUDGES AND BAR.**

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Cases decided in the House of Lords, on Appeal from the Courts of Scotland, between 3rd August, 1850, and 9th August, 1850. Reported by Sydney S. Bell, of Lincoln's Inn, Barrister at Law. By appointment of the House of Lords. London: W. Maxwell and Son, 32, Bell Yard, Lincoln's Inn. Edinburgh: T. and T. Clark.—Vol. VII. Part III. *Paterson v. Paterson*, p. 337.

Report of Cases decided in the House of Lords, upon Appeal from Scotland, from 1753 to 1813. By Thomas S. Paton, Esq., Advocate. Being the Continuation of the Reports of Messrs. Craigie and Stuart. Edinburgh: T. and T. Clark, Law Booksellers, 38, George Street. London: Benning and Co.—Vol. II. Part II. *Arthur v. Gourlay*, p. 184.

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THE curiosities of research in legal literature have recently been illustrated by a discovery in the annals of Scottish jurisprudence, which we feel it a duty to bring under the notice of the profession. And as if to make the circumstance more piquant, it has arisen out of that courageous administration of the appellate jurisdiction of the House of Lords, which Lord Brougham so strikingly exemplified last session, when he sat alone as supreme judge in review of the judgments of the whole tribunals of the empire. As usual, there were not wanting Scotch cases, among which was that of *Paterson v. Paterson*, the parties being husband and wife, and the latter suing the former for separation à mensâ et thoro, on the ground of cruelty, and for “aliment.” In disposing of this case, Lord Brougham took occasion to reverse the judgment of the Scotch court in a manner, and with the exposition of legal views, which we be-



lieve startled the jurisprudential intellect of the Parliament House, where, we grieve to learn, there is wanting that profound submission of mind which should accompany all professional consideration of the proceedings in the court of the last resort.

The nature of the case may be shortly explained. The respondent in the appeal, Mrs. Elizabeth Russell, or Paterson, had brought a suit in the Scotch court for separation à mensâ et thoro from her husband, Mr. Duncan Campbell Paterson, of Lochgair, in Argyleshire, on the ground of cruel treatment; and she also prayed, by her summons, for a suitable maintenance while living separate from him. The case certainly is a very peculiar one, and, we believe, raises the legal question in a form in which it has never yet been considered. The appellant, shortly after his marriage with the respondent, conceived an intolerable aversion to her, who, on her part, had been unconscious of having given her husband any deep offence. Even before their union it would appear that he had little or no affection, his object being money, and release from pecuniary embarrassment. The dislike in the husband became so strong, that he treated his wife with a contempt and cutting insult which, to the mind and feelings of any woman, must, we should think, be even more harrowing, and the cause of more wretchedness, than even the barbarism of actual personal violence. The evidence, consisting of letters and the depositions of servants, clearly established all this, and even more. In a letter, dated 2nd October, addressed to his father-in-law about three months after the marriage, Paterson says—

“The same letter which covered my proposal for your daughter, covered a most urgent solicitation to be relieved of some pressing pecuniary embarrassments which were adjusted by you, and my proposal at same time formally accepted by your daughter, whom I had been the means of bringing specially to London. . . . My coldness of manner, avoidance and general deportment, were too apparent to be misunderstood, and became the subject of remark amongst them (the friends of his wife he then met).”

On the 28th November he wrote—

“That there exists now, as at all previous times, an involuntary avoidance and coldness I cannot deny; everything she says, and everything she does, is so distasteful to me, that I almost imperceptibly shrink from those attentions which may be expected from me.”

On the 26th December he again writes in the following extraordinary terms—

“You have very justly, as you say, looked upon me as a man and not a boy, but you must be aware that the feelings and passions of a

man are more obdurate, more fixed and unalterable than are those of a boy, who can hate to-day and love to-morrow; and if I had ever loved or ever breathed affection for your daughter, you might justly accuse me of boyish caprice and want of steadiness; but, my dear sir, you know well that such was not the case, but the very reverse. . . . As to a separation to which you have more than once alluded, I can only say that we are as much separated now as if she were living under the roof of her parents; we have separate apartments, separate feelings, and, I may add, separate interests . . . separate correspondence, for we know not to whom the other writes or from whom they hear, and are constantly guilty of writing the same day to the same parties, ignorant alike of the facts or the contents. This you will admit is by far a more discreditable separation than if distance were added. . . . I therefore openly avow the truth, and declare at once the utter impossibility of my ever again returning to her apartment. There can be no restoration of happiness which never existed."

In another letter he admits that "there is an actual separation existing."

By the evidence of the servants, and, it may be added, by that of admissions in his own pleadings in the cause, it was proved that Paterson and his wife never met except at meals, when he never spoke to her, but addressed all his conversation to his sister, who lived with him; that he was in the habit of walking out with his sister, but never with his wife; that Mrs. Paterson, though entrusted with the keys of the house, never received the slightest attention from her husband; she appeared wretchedly unhappy, and was frequently seen in tears. On one occasion he had been absent from home for several months; and, when on his alighting from the carriage which had conveyed him home, she held out her hand to him, he refused to take it, and passed by without any recognition. He would not allow her family to visit her; and threatened them with violence if they attempted to enter his house.

Matters got worse, until at last the poor woman became so miserable that, after about nine months residence with her unfeeling husband, she was obliged to leave his house, and seek for protection among her own friends. She, accordingly, in order to vindicate herself and assert the rights of her position as a married woman, brought this suit for separation *à mensâ et thoro*, and for a suitable aliment.

Such a case is, from its nature, peculiarly one of circumstances. It is difficult to draw the line, and to lay down any general rule as to the domestic conduct which will warrant this suit. Some nice speculation on the subject is to be found in the Scotch books.

Paterson pleaded to the suit, admitting a considerable portion of the summons, but denying several of its averments.

The case was very fully argued in Scotland, the present Lord Advocate and Dean of Faculty being the leading counsel on either side; and after hearing these learned gentlemen and their juniors at great length, the Scotch court, in very emphatic terms, decided in favour of Mrs. Paterson, finding that she was entitled to live separately from her husband, and ordaining him to separate himself from her *à mensâ et thoro* in all time coming; and as to the aliment, ordering the husband to give in a special condescendence of the amount of his means and estate.

The court were not unanimous, however, and it is but fair to Lord Brougham to state, that Lord Fullerton, unquestionably one of the ablest and most esteemed of the Scotch judges, dissented from his brethren, on the ground that, while in point of morality and good feeling, the conduct of the husband was indefensible, the facts were not so tangible as to bring them within the compass of legal rule. The opinions of the other judges were very decided, demonstrating a violent conflict of opinion with the House of Lords.

The Lord President said that,—

“This appears to me a most extraordinary case, for which no parallel can be found in the law of either Scotland or England. It is a case of *sui generis*, and he hoped it might be truly said Mr. Paterson is a husband *sui generis*. The action has been brought by the lady to effect her deliverance from the unparalleled *sævitia* with which she was treated while under the roof of her husband. . . . He proposed marriage to this poor girl to relieve himself from pecuniary embarrassments. It is clear from his correspondence that he never entertained any feeling of affection for her, but regarded her with feelings of alienation. She was the object of his hatred and disgust, and he avows in his letters that such were his feelings towards her from the first moment of their acquaintance. He would not trouble their lordships by reading these letters, but a perusal of them puts this matter beyond doubt.”

His Lordship then emphatically said,—

“A case of this sort is perfectly unparalleled; and the question comes to be, whether in a case in which, although no actual personal violence has been established, there is the most complete proof of a long course of contumely, an utter disregard of all the decencies of society, a total desertion of all the duties which a husband owes to his wife, and an express and avowed determination to persevere in this course of conduct,—in such circumstances as these, can the court give no remedy to the aggrieved party?”

Lord Mackenzie said,—

“I concur in thinking this a most peculiar case. No such cases ever yet appeared in our practice, and I trust none like it will appear again. . . . The defender avows that he contracted marriage with most interested motives. He admits that he not only felt no affection for his wife, but that he actually regarded her with feelings of aversion,—of hopeless aversion which he knew he would never overcome. He made no attempt to overcome that feeling. . . . If this remedy is not competent, the wife must maintain herself; for it is plain that she cannot continue to live with her husband . . . . Before I conclude I cannot help asking what is the motive of this defence? Does the defender say that his happiness will be destroyed by the separation? On the contrary, he says he has no pleasure in his wife’s society; that he is miserable, that it is not his marriage, but the presence of his wife that makes him so. He wishes to torment himself because at the same time he torments his wife; or else he means, miserable as her presence makes him, paying her aliment will be still greater misery.”

Lord Jeffrey concurs with the Lord President and Lord Mackenzie. His Lordship observed,—

“We find that in the law of England nothing short of violent or imminent danger to the person is a ground for insisting on a separation *à mensâ et thoro*. We are all agreed, for even Lord Fullerton does not even dissent on this point, that such is not the law here. In the neighbouring country a peremptory line is drawn between injuries to the body and injuries to the mind; but it is impossible to maintain that any such impassible bar exists in this country; and therefore so far our ground of decision is clear . . . .

“It is clear that mere distaste or dislike will not do, but here we have admission under the husband’s own hands that he has all along entertained a rooted aversion to his wife. . . . . It may be that he cannot help his aversion; but the law will not allow him to say that he cannot help his manifestations. Another man might as well say that he could not help manifesting his by blows, which most probably give less pain. Since he insists upon living with her, he is surely bound to treat her with civility, and not entitled to indicate disgust and aversion in the whole course of his conduct. . . . . Nor can I understand what the defender’s interest can be to resist this action. He says in his letters, ‘we cannot be more completely separate than we are now. This separation is more discreditable than a judicial separation would be.’ I do think it was more discreditable to him. He says at one time that her going on a long visit to her relations would be an unspeakable relief to him. He does not now pretend an unwillingness to break up the conjugal society. He is quite willing in short that there should be a separation, but he will not consent to pay aliment. . . . . Therefore on the whole matter, though I agree that the whole case is a novelty (and I trust that it will also be a singularity), and while we proceed on no new legal principle, or

any thing but what has been fixed before, viz., that bodily violence is not necessary, I think there are circumstances proved here, which, if they should ever be proved again as clearly, will be a sufficient ground for a judicial separation."

Such were the emphatic and expressive terms in which the Scotch judges declared the protection which their jurisprudence afforded to an insulted wife. The principles on which they proceed we cannot but cordially applaud, not more as lawyers than as members of society.

But the husband is unwilling to part with the wife he detests; and he appeals to the House of Lords, of whose legal authority at the time Lord Brougham was the judicial impersonation. And we now beg our readers to observe the manner in which this affecting case is treated, and the judicial comity conceded to the Scotch judges. Doctors' Commons is brought at once to bear on the Scotch suit.

Mr. Rolt and Dr. Harding appear for the appellant, and Mr. Rolt is about to open the appeal, when he is thus interrupted by Lord Brougham:—

"**LORD BROUGHAM.**—*There is no allegation whatever on which the judgment can be supported.* The House would rather hear the other side, *as at present there is nothing for it to attend to.* We will hear Dr. Harding in reply, should it be necessary."—(We quote from the last number of Mr. Sydney Bell's House of Lords Cases.)

Mr. Turner and Mr. Andrews accordingly proceed to argue for the respondent, and, in what we are assured is a moderate and clear statement of Scotch law, they cite the following strong and pointed dictum of the then Lord Justice Clerk of Scotland, the present universally esteemed and venerated Lord Justice General:—

"I never can accede to the proposition that the only legal ground of matrimonial separation must rest upon personal violence. That is not the law of the country, and I will venture to say that it is not the law of any civilized land. A train of mal-treatment may occur in the married state to be viewed and weighed according to the status of the parties in society, perfectly sufficient to found a claim of judicial separation, without an approach to personal violence."

His (the appellant's) conduct, observed these learned counsel, is one of silent cruelty, intended sooner or later to break the heart of the respondent.

"It never can be said (they proceed to say), where a husband refuses cohabitation with his wife, or to hold conversation or any kind of society with her, that he is performing the contract of marriage."

On the 30th July Lord Brougham pronounced the supreme

judgment of the House of Lords. After explaining the view he took of the facts, his lordship speaks of the wife as "the innocent sufferer in this case; and with respect to her, the feelings of the court below appear to have been not unnaturally, I may say almost unavoidably, awakened. In these feelings I heartily concur; but, my lord, a judge has no right to indulge his feelings; no right to entertain any feelings which can, in any, the slightest degree, affect his judgment. He must not feel for one party or the other, nor know any desire, any sentiment, except a fixed resolution to administer justice, stern and unbending, between the two; justice according to the stern and unbending letter of the law, whose organ he is."

With the greatest deference to Lord Brougham, we humbly and respectfully venture to suggest that the judicial, not less than the juridical principle he would lay down in this passage, may be calculated to mislead the student of consistorial law. A judge is not a mere machine, but a rational being, and is not permitted—justice does not permit him—altogether to ignore his own feelings. He may feel judicially in consequence of that which is brought before him judicially; and where evidence is such as necessarily to address the feelings, the judge is bound to feel intellectually, and, in matters between man and wife, equitably, and even benevolently. The expression of "the stern and unbending letter of the law," we had thought to be quite beside the case. The law to be sure must rule; but the spirit rather than the letter should, we think, be sought.

Such being the hard canon of construction applied by Lord Brougham to the circumstances of the case, we cannot be surprised at his lordship affirming "that the court below has widely departed from an accurate view of it." Lord Brougham then proceeds with an exposition of his legal opinions; and we believe that we faithfully represent these, in saying that a case, to ground separation *à mensâ*, must fall under one of the three following heads:—1st. Actual personal violence; 2nd. Threats of personal violence; or, 3rd. Mal-treatment direct, or the necessary consequence of the conduct complained of, by which the health is injured or put in danger. In considering this third principle, his lordship applies to it such nice metaphysics as excludes unfortunate Mrs. Paterson from legal shelter. But that this poor lady's health was in danger—the health of her mind as well as the health of her body—there can, we should think, be no doubt. But even were it otherwise, we declare it to be a scandal to the law of a civilised country, that a wife should be compelled to live under the same roof with her husband in the outrageous circumstances here disclosed. The



decision of the Scotch Court was reversed by Lord Brougham, to the astonishment (when it became known) of the profession in Scotland; and the anomalous character of the House of Lords as a court of appeal from Scotland is considered to be more apparent than ever.

But now comes the interesting and curious sequel. An industrious Scotch lawyer,<sup>1</sup> who has been usefully employing his leisure in filling up a gap of reports of Scotch appeal cases, extending from 1753 to 1813, issued shortly after Lord Brougham delivered the above judgment, in contemporaneous illustration of Scoto-English law, a periodical number of cases, among which is one where a Mr. James Arthur is appellant, and a Janet Gourlay respondent. The case appears to have been heard in the House of Lords on the 9th of March, 1769, before Lord Camden, Lord Mansfield, and the then judicial staff of the House, and to have been argued by "*A. Wedderburn*" and "*A. Forester*" for the appellant, and by "*C. Yorke*" and "*H. Dalrymple*" for the respondent. The respondent had been originally the servant of the appellant, and on their connexion coming to the knowledge of the public by her pregnancy, they were privately married by mutual acknowledgment and marriage lines. Arthur left the country immediately thereafter, joined the navy, and having acquired a fortune in India, he returned to Scotland after ten years absence. On his return he did not wish to renew the connexion, whereupon a suit of declarator of marriage, legitimacy (of the child the fruit of the connexion) and adherence was raised by the woman, and defended by Arthur; but the declarator prevailed, and the respondent had decree accordingly. She now brought an action for aliment since the date of the connexion, amounting to 360*l.*, and 40*l.* per annum for future aliment. In defence of this action it was pleaded, that the respondent refused to adhere to the appellant, as was evidenced by a decree of adherence he had obtained in an action of adherence against her. To this it was replied, that the action of adherence was a mere cloak for other designs; that both before and while it was going on she had repeatedly offered to come and live with him, on condition of his taking up house in a regular way for her and her family; that instead of doing this, the appellant had taken a room for her and daughter, a considerable distance from his own lodging, where, instead of living in her society, he lived by himself; that the reception on this occasion was cold; that when she offered to salute him he would not allow it. (The identity of this evidence with the case

<sup>1</sup> Mr. Thomas S. Paton, Advocate, whose research we cannot too strongly commend.



of the Patersons is remarkable. It will be recollected, that on Paterson's return home after several months absence, he refused, on alighting at the door, to recognize his wife who had held out her hand to him. And there were other circumstances of maltreatment very similar to the case decided by Lord Brougham.) The Scotch judges of the day decided as the Scotch judges in Patersons' case did, and found that the wife was entitled to aliment. The case then came by appeal before the House of Lords, where it appears to have been very anxiously and ably argued. The grounds and principles founded on by the counsel for respondents being almost identical with the facts of Paterson's case, similar in kind, although infinitely less offensive in degree. The husband's aversion to the wife's society, his refusal to salute her, and his refusal to perform his matrimonial duties, being the facts mainly relied on.

This argument was allowed by Lords Camden and Mansfield in the House of Lords, and the judgment of the court below was affirmed with costs. When we recall to Lord Brougham the testimony he himself has borne to these two eminent lawyers (see his *Historical Sketches of Eminent Statesmen in the Reign of George III.*), he could not in his candour find fault with the notice by which we have contrasted his lordship's administration of Scotch law with that of such great jurists.

We now leave this curious legal story in the hands of our readers. We began with "*Lord Brougham v. The Scotch Judges and Bar,*"—and we now conclude with *Lord Brougham v. Lord Chancellor Camden and Lord Mansfield.*

R. S.

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**ART. VII.—THE RIGHT TO THE FEE-SIMPLE IN THE  
SOIL OF THE SEA SHORE.**

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The Speech of Mr. Serjeant Merewether, &c. upon the Claim of the Commissioners of Woods and Forests to the Sea Shore, &c. &c. 8vo. pp. 48. Butterworths, London.

A Dissertation on the Rights to the Sea Shores, &c. &c. with especial Reference to Mr. Serjeant Merewether's published Speech upon the same Subjects. By James Jerwood, Esq., of St. John's College, Cambridge, M. A., and of the Middle Temple, Barrister-at-Law. 8vo. pp. 140. Butterworths, London.

**T**HE claim on the part of the crown to the ownership in fee of the sea shores of England and Wales—estimated at 700,000 acres—involves questions of such magnitude, variety and importance, is attracting so much public attention, and exhibits so many points of interest, when examined from a legal point of view, that we shall need no apology with our readers for devoting some pages to the discussion of it.

The manner in which the question has been raised is briefly this:—

In February, 1844, an information in equity was filed by Sir F. Pollock, Attorney-General, against the corporation of London, some of their officers and others, containing among other matters the following allegation:—"That by the royal prerogative the ground and soil of the coast and shores of the sea round this kingdom, and the ground and soil of every port, haven and arm of the sea, creek, pool and navigable river thereof, into which the sea ebbs and flows, and also the shore lying between high water mark and low water mark, belong to her majesty." The cause having been heard in the first instance before the Master of the Rolls, who pronounced judgment in it, was subsequently brought by way of appeal by the corporation before the late Lord Chancellor, to whom Mr. Serjeant Merewether, as town clerk of the city, addressed an argument on December 8, 1849, contesting the above doctrine. His speech on that occasion has been printed and published, and the publication of it has given rise to a counter publication, containing a very lengthy and laboured attack on the learned Serjeant's positions by Mr. Jerwood, of Exeter. Taking these texts as a convenient ground work, on the assumption that they respectively comprise the kernel of the case (which does not lie in a nutshell) on the one

side and on the other, we propose to treat of the more prominent parts of it; so as to present, as far as in us lies, a just view of the general question, without, however, entering into various minutiae, and, as it seems to us, somewhat irrelevant matters, which have been forced into the discussion by the latter learned gentleman. But, first, we beg leave to submit one consideration as indispensable to be carefully borne in mind, in order to enable any one taking up this subject to arrive at just views upon it, namely, that the argument on behalf of the city is an argument in support of the negative, and therefore to be treated and met with a high degree of wakeful candour, and every branch of it submitted to lengthened and earnest research, before an opponent can be in a position to assert that he has refuted it. The whole scope of that argument may be thus represented. Admitting that the proposition now advanced by the crown (as set out above) has been repeatedly asserted as well by text writers as by learned judges on the bench, it is contended there is still no sufficient authority for it, inasmuch as it has never been judicially decided after argument in a case expressly raising the question as between the crown and the subject, and statute law being silent on the point. Now this bare statement of the case will be found, we think effectual, to enable us to cast aside at once a load of matter with which the discussion has been encumbered. "Selden," says Mr. Jerwood—that is, he says so in effect, but takes in fact seven or eight pages to say it in,—“in the *Mare Clausum*, states the right to the shore to be in the crown, why is he not alluded to by the serjeant?” The answer, assuming for the moment that the *Mare Clausum* contains the statement, is obvious, because the admission has been made once for all that various text writers assert the proposition. But the truth is, that Selden, as cited, says no more (if so much) than that the dominion over the sea, and right to the soil at the bottom of the sea—the *fundus maris*—has ever been in the crown (which is not disputed at present),<sup>1</sup> and the only mode after all by which Selden is pressed into the service is to be found in Mr. Jerwood's whimsical remark upon this,—“it is not easy to see how the sovereign can possess the sea without the shore.”<sup>2</sup> So that Selden, and the omission to mention him, seem not to have much, if any, bearing upon the real question; and as to the imputed difficulty, there appears to us, we confess, a much greater one, closely connected with this title to the soil of the sea. If the right to land suddenly left dry by retirement of the sea is in the

<sup>1</sup> See *In re Hull and Selby Railway Company*, 5 M. & W. 327.

<sup>2</sup> *Dissertation*, p. 15.

crown by reason of the right to the fundus maris, is it very easy to see why the equally well settled right of the proprietor of the adjoining lands to increments formed by alluvion or gradual retirement of the sea should not be in like manner attributable to his right to the sea shore? Various other text writers are besides referred to by Mr. Jerwood, and various dicta of judges are set out at great length, just as if all the strength that can be derived from all of them collectively to the opposite argument had not been at the outset most fully and frankly admitted in the argument for the city. With one exception, therefore, we shall not invite our reader's attention to any of these authorities, considering that to do so would be mere waste of their time and our space. The exception is Lord Chief Justice Hale, on whose credit, it may suffice to say, without going into the discussion of the genuineness of the Treatise De Jure Maris, &c. printed in his name, the whole of the doctrine of the royal title to the sea shore, or the land lying between the ordinary high and low water marks, ultimately rests. In that treatise the right is asserted in unqualified terms to reside in the crown where not granted out; but whether it proceed from Lord Hale's pen or not is a question which appears to us to have but a faint bearing on the decision of this; for the treatise has never been taken in our courts as being an ultimate, undeniable, unassailable authority. So far from that, we find in two particulars with respect to this and a similar question, to mention no more, the law it lays down has been, as we submit, overruled; for *Blundell v. Catterall*, 5 B. & Ald. 268, seems to have upset the position of the treatise, that the sea shore is a highway; and *Ball v. Herbert*, 3 T. R. 261, seems to have upset, not to say scouted, the position of the treatise, that there is a common law right of towing on the banks of public navigable rivers, paying compensation for injuries done to the banks. Then is Lord Hale a safe or sound authority in a question between the crown and the subject? Is not his royal and monarchical bias notorious? Nay more, were not certain doctrines he delivered from the bench such as, if acted on and carried out to their fair consequences subsequently, would have left the people of England at this day not merely unable to call their sea shores their own, but in the condition that their lands and purses, and liberties, all would have been by law held at the will of the crown? Two only of these doctrines held by Chief Justice Hale, and promulgated deliberately by him from the bench in solemn judgments, would, taken together, have gone pretty far towards this consummation. He laid down that the customs on wool, woolfels and leather were at common law due

to the king;<sup>1</sup> and he held that the crown has power to grant a charter with a non obstante of an express act of parliament.<sup>2</sup> The bias above referred to has been touched by a contemporary thus:—"In case any implicit confidence should be demanded even for the writings of Hale, we extract from a recent lecture by Professor Amos the warning of Sir Michael Foster. It cannot be denied, and I see no reason for making a secret of it, that the learned judge hath in his writings paid no regard to the principles upon which the Revolution and present happy establishment are founded. The prevailing opinions of the times in which he received his first impressions might mislead him; and it is not to be wondered at if the detestable use the parliament's army made of its success in the civil war did contribute to fix him in the prejudices of his early days."<sup>3</sup> And though Lord Campbell's view of his character is so favourable, that almost the only one of his faults or bad practices, except to be sure that he is obliged to say, that his conduct in deciding *R. v. Duny*, the witchcraft case, as he did, made him the real murderer of two women, which Lord Campbell does not find means to palliate, is that of smoking, which the noble biographer expresses himself as afraid that Hale committed to excess, yet other authorities have dealt less leniently with the chief justice; and the same bias in cases of treason has not escaped the sagacity of Mr. Hallam, who, though in feeble terms, signifies his regret at the timidity of Hale on such occasions, and points out the evil consequences which have arisen from following his authority.<sup>4</sup> Granting therefore that Lord Hale was the author of this treatise, his authority, unsupported by a decided case, will probably not be deemed very conclusive in a question where the claims of the crown and the subject conflict.

But then (it is said) various treatises of authority and whole generations of judges have adopted Hale's doctrine; nevertheless, the chain cannot be stronger than its weakest link. "Mere statement and restatement of a doctrine—the mere repetition of the *cantilena* of lawyers—cannot make it law, unless it can be traced to some competent authority; and if it be irreconcilable to some clear legal principle."<sup>5</sup>

<sup>1</sup> *Vere v. Sampson*, Hardres, 214.

<sup>2</sup> In *Thomas v. Sorell*, Vaugh. R. 330; S. C. 1 Freem. 85; 1 Lev. 217; 2 Keb. 245; 3 id. 76 et seq.; Hale, C. J., was one of eight judges who held such a charter good against four who held it void.

<sup>3</sup> Edinb. Rev. January, 1851, p. 117.

<sup>4</sup> Hallam, *Constit. Hist.* vol. ii. p. 321, 5th edit. See an instance, 1 Hale, P. C. 118, pl. 7.

<sup>5</sup> *Per* Lord Denman, C. J., in *Dom. Proc.* *O'Connell v. Reg.* 11 Cl. & F. 373, which was the first case in which it had ever been doubted that a general

So in *Hutton v. Balme*,<sup>1</sup> the Court of Exchequer, going much further than this, overruled the decided cases running through a period of nearly fifty years, cases appearing in numerous reports, and involving a doctrine laid down by all the text writers on the subject. But all these solemn judgments were traced to a dictum by Lord Mansfield in his first judicial year (in fact twelve days after his appointment), occurring in *Cooper v. Chitty*, 1 Burr. 20), which dictum was held by Mr. Justice Bayley to be untenable; and Lord Lyndhurst, C.B., pronounced the unanimous opinion of the court, denying the authority of those cases, and overruling them all.<sup>2</sup> After this there is nothing surprising in the case of *Reg. v. Millis*,<sup>3</sup> which occurred on a subject in which there was an unanimous opinion at the English Bar, founded on the *dicta* of judges as illustrious as any who have ever filled the seats of justice in this country, upon a question of the most delicate nature and of transcendent importance, viz. of what is a valid marriage. *Dicta* were recorded of Hale, Lord Mansfield, Lord Ellenborough, Lord Kenyon, Lord Tenterden, and Lord Chief Justice Gibbs, and many other judges, all clearly taking the same view, and Lord Stowell had even pronounced a deliberate decision according to that opinion. Yet when *Reg. v. Millis* came before the House of Lords, the judges were of opinion directly contrary to their predecessors; and the House of Lords being equally divided, the result was, the judgment of the court below stood confirmed against all the *dicta* and the decision mentioned. Nor can it be necessary to remind legal readers how the practice of general warrants and secretary of states' warrants, though established upon the unvarying usage of many years, and the authority of text books, was utterly demolished by a series of cases, the first moment it came to be questioned.<sup>4</sup> One more instance, not noticed hitherto

judgment is good on an indictment consisting of several counts, of which one or more is bad, provided one or more be good; the House of Lords, however, held the contrary of this doctrine, which was traced to a *gratis dictum* of Lord Mansfield, thus setting aside the well established practice, though there was not, in the words of Lord Brougham, "one *dictum* of a judge, one sentence of a text writer, or one shadow of a decision," to be brought forward in favour of the change.

<sup>1</sup> 2 C. & J. 19.

<sup>2</sup> See *per* Lord Denman, 11 Cl. & F. 369.

<sup>3</sup> See *id.* & 10 Cl. & F. 534.

<sup>4</sup> *R. v. Wilkes*, 19 St. Tri. 982; S. C. 2 Wils. 151; *Wilkes v. Wood*, at *Nisi Prius*, Lofft's Rep. 1; *Huckle v. Money*, 2 Wils. 205; *Beardmore v. Carrington*, 2 Wils. 244; *Entick v. Carrington*, 19 St. Tri. 1073; S. C. 2 Wils. 275; *Money v. Leach*, 3 Burr. 1692, 1742. Though it was said in argument in both the last cases that the practice was not older than the Revolution, yet there are distinct traces of a very similar practice having been current much

we believe, may be mentioned, as showing clearly the way in which doctrines come to be received under that large head, as Lord Denman has declared it to be, of law taken for granted. In Buller's *Nisi Prius*, treating of the action for mesne profits, it is said, "In case the plaintiff can prove his title accrued before the time of the demise, and prove the defendant to have been longer in possession, *he shall recover antecedent profits*," and a *nisi prius* decision of Eyre, C. J., is referred to. Now, besides this and another *nisi prius* ruling (*Doswell v. Gibbs*, 2 Car. & P. 615) there appears to be no reported case to support this statement, which is manifestly contrary to principle, yet nearly a dozen treatises have copied the law as thus laid down by Buller, referring to his book; and this is the more remarkable, as there are several decisions and authorities to the contrary,<sup>1</sup> which have been overlooked. As was said by the Court of Exchequer Chamber, in speaking of an *obiter dictum* of the full Court of Queen's Bench, reported in an old case in Ventris, "These various repetitions, derived from the same source, cannot raise the authority of the proposition itself higher than that which it originally possessed;"<sup>2</sup> and on the whole we think it may safely be concluded that neither a series of concurring *dicta*, nor established practice, nor unbroken unanimity of text writers, can make that to be law which rests on no principle, supposing the statute law to be silent on the subject.

But it perhaps may be urged this case is placed on the footing of principle; for Mr. Jerwood contends, that all land is held mediately or immediately of the crown,<sup>3</sup> and therefore, unless it can be *proved by producing the grant or other matter of record*, by which the land of the sea shore in any given case passed out of the sovereign, the property therein still remains a flower of the crown. Now it is true that Mr. Jerwood cites—perhaps somewhat needlessly—the index of an Yearbook to establish the above recondite feudalism respecting the tenure of lands; but does his conclusion follow? Because "the lands in London

earlier. See Howell's case, Tri. T. 19 Eliz.; 1 Leon. 70; and some curious precedents, Moor. Rep. 839. See also Anon. Ventr. 31.

<sup>1</sup> Anon. 1 Vern. 105; 2 Lilly, Pract. Reg. 596; Tilley v. Bridges, 2 Vern. 519; S. C. Prec. Chanc. 252; Vin. Abr. Mesne Profits, B., citing 2 Bulstr. 25, *acc.*; *per* Lord Hardwicke, C., 1 Ves. sen. 249; Newport's case, Skin. 424.

<sup>2</sup> *Veley v. Burder*, 12 A. & E. 307. The freedom of a slave landing in England was established by Lord Mansfield in a case (*Somerset v. Stewart*, Lofft's Rep. 1), where he openly declared in effect his carelessness of the authority of judges, however eminent, if it were contrary to principle; and the question was decided, in opposition to opinions of Lord Talbot and Lord Hardwicke.

<sup>3</sup> Dissertation, p. 29.



are holden of the king,"<sup>1</sup> is it quite a consequence that every acre belongs in fee simple to the sovereign, the grant of which to a subject cannot be proved at this day by the record? Possibly some of his and our readers may be inclined to doubt whether Mr. Jerwood displays such a familiarity with ancient grants, records and similar muniments as qualifies to be a safe guide on this part of the subject, when they find him seriously attempting to dispute with the learned serjeant the meaning of the term *infra manerium*, and contending, on the authority of Facciolati's Ciceronian Latin Dictionary, that *infra* means "below" in that connection, with a view of invalidating the effect of Sir Henry Constable's case, which the serjeant (as we submit with perfect correctness) had claimed as an authority in his favour. Now, not trusting ourselves to dwell upon the oddity of calling in Facciolati to decide a question of Mediæval Latinity, it will probably suffice to observe that there are two other places in Sir H. Constable's case in which the word occurs, and from its context can obviously be capable of no other meaning than "within," which every one who has ever seen an old municipal charter knows is the indisputable sense that, as the serjeant observes, the word bore in the times of which he is speaking. A thousand other instances might be produced in proof.<sup>2</sup> This is material, because we believe all grants of wreck use the words *infra manerium*; and as wreck can hardly be thrown on the manor above high water mark, such use looks very much like an acknowledgment that the shore or land between low and high water mark is part of the manor.

In the argument for the city, and we must say, speaking of the form of it, and not undertaking to pronounce farther at present, that a more calm and compact argument we believe it would be difficult to instance, or one in which all superfluities are more skilfully pared away; every sentence telling and conducing to the main result, so as to form a signal example of that *concinnitas* which Cicero so often insists upon as an essential element in the art of persuasion, and even recalling the praise which that great lawyer and acute critic bestows on another

<sup>1</sup> Fitz. N. B. 144, G.; Com. Dig. Prerog. D. 59.

<sup>2</sup> Such are *infra burgum*, *infra corpus comitatus*. In the old commission of sewers, Fitz. N. B. 113, A. the phrase *tam infra libertates quam extra* occurs four times. So the writ of *quare ejecit infra terminum*, *id.* 197, S. The statute of *Prærogativa Regis* uses the term *infra regnum*. See also 3 Inst. 113; 2 Show. 131; Hale, Jur. Maris, 27, from all which authorities it will be found this use of the word was well established a little earlier than Coke upon Littleton, as Mr. Jerwood supposes, p. 59, an ingenious and learned conjecture, with which he is so well satisfied—*sui amans sine rivali*—as to have been at the trouble of referring to it twice or three times in his index.

powerful advocate—*reperiebat quid dici opus esset, et quomodo præparare, et quo loco locari; memoriâque ea comprehendebat Antonius*:<sup>1</sup>—in that argument the principal ground taken is the silence of the old reports and other earlier authorities with respect to this alleged right of the crown, and authorities and cases are cited which are remarkable in this view, because touching on kindred subjects, such as wreck, &c., they make no allusion to this. Many of them are especially remarkable, if they may not be considered conclusive in favour of the learned Town Clerk's argument in this further respect, which he thus glances at. Answering an objection of the Lord Chancellor to the effect that the fact of a controversy between two subjects having been decided by the court in a very old case, known as the Toppesham case, did not show that the crown had not an original title to the subject in dispute, which was "*portus et piscaria et mariscus de Topsham*," the serjeant observes, "No, my lord, but I think your lordship will see that if the crown had had any title, it would have interposed, as was the practice in those days."<sup>2</sup> Now the practice not only was doubtless so, but it went even further, for "if the title of the crown appeareth, yet he is not party, the court of office shall adjudge for him," is laid down in *Willion v. Berkeley*, Plowd. C. 145; and the same doctrine is confirmed by numerous examples cited by Lord Hale himself in a note to Fitzherbert's *Natura Brevium*, who also mentions an instance of it.<sup>3</sup> Certainly then it is striking to find a total absence of any trace of such prerogative right in these ancient cases and authorities, several of them expressly treating of and setting forth the royal prerogatives, and very many others dealing with subjects bordering on this, all allusion to which nevertheless they obstinately omit to make; it is not the less striking when we consider that every prerogative is as ancient as the crown itself.<sup>4</sup> Having instituted, for the purposes of this article, a minute and anxious investigation into this matter, we are prepared to confirm to the full the serjeant's averments of this class. The same, so far as an examination of 900 of them goes, we can say respecting the Saxon charters; so of other averments. Thus we find laid down as the law, temp. Hen. I., *Hæc sunt jura quæ rex Angliæ solus et super omnes homines habet in terrâ suâ*, enumerating, among other things, *thesaurus inventus, naufrâ-*

<sup>1</sup> Cicero, *Brutus*.

<sup>2</sup> Speech, p. 16.

<sup>3</sup> Fitz. N. B. 38, E.; and see Lord Hale's Note (a); and per Choke, C. J., Yearb. 21 Edw. IV. fol. 3, pl. 5; per Hankeford, J., 11 Hen. IV. fol. 71.

<sup>4</sup> R. v. Bates, Lane, 26; 16 Vin. Abr. 567, pl. 27.

*gium, maris algarum*, but omitting all allusion to this right to the shore;<sup>1</sup> and in Dugdale's History of Imbanking, an immense mass of commissions of sewers, statutes, ordinances, bye-laws, charters, inquisitions, writs of *ad quod damnum* and others are given, several of which relate to the Thames, but all, we believe we may venture to assert, wholly without hint or trace of this prerogative.<sup>2</sup> A long continued examination of the Year Books enables us to speak with similar confidence respecting them; those *annosa volumina vatum* bear negative witness in support of the argument for the city, and the implied testimony derivable from various cases in them seems to us strong against the prerogative claim. Thus in the case referred to by the serjeant,<sup>3</sup> from the Year Book of Edw. IV., part of what is said by Choke, C. J., goes further than what is cited for the city, for Choke says, "If I have land adjoining the sea, so that the sea ebb and flow on my land, when it flows every one may fish on the water which is flowing over my land, for then it is parcel of the sea, &c." Evidently assuming that ordinarily the shore is parcel of the adjoining lands. In another case in the same Year Book not mentioned by the serjeant, the same quite as clearly appears. It is a case of trespass for taking two butts of wine.<sup>4</sup> Defendant pleaded they were wrecked out of a ship, and by the reflux of the sea thrown upon his manor, and prescribed for wreck, &c. The court objected to the plea on another ground, but took no point that it was bad for not showing that the shore was part of the manor by grant, &c., as they would have done (it would seem) if the modern doctrine of the dicta, that the shore is *primâ facie* in the crown, had been then known and accepted as law.<sup>5</sup> With respect to the modern cases, we must express our concurrence with the view taken of them in the argument for the city, and especially we agree with the learned Town Clerk in considering that the Duke of

<sup>1</sup> Ancient Laws and Institutes of England (published for the Record Commissioners by Butterworths), p. 224.

<sup>2</sup> See especially the Charter of Edw. IV. incorporating inhabitants of Romney Marsh, Dugd. p. 34; case of the Prior of Bilsyntone, 20 Edw. II. id. p. 42; case of Sea Bank above Greenwich, 19 Edw. II. id. p. 59; cases respecting Banks of Thames, 18 Edw. II. id. p. 69; and see id. pp. 57, 63, 64, 65—68, 238.

<sup>3</sup> Speech, p. 25.

<sup>4</sup> Yearb. 9 Edw. IV. fol. 22, pl. 23.

<sup>5</sup> The customs as pleaded in *Simpson v. Bythewood*, and *Geer v. Burtenshaw*, 3 Lev. 307 and 85, and Lev. Entr. 214, lead to the same inference; and see special verdict, *Sheppard v. Gosnold*, Vaugh. 160. The statute 7 Jac. I. c. 18, recognises the right to the shore to be in those who have the adjoining lands, whom it calls "the owners of the soil there," see *Calmady v. Rowe*, 6 C. B. 891.

Beaufort's case<sup>1</sup> has *incidentally* decided the question. Mr. Jerwood replies as if it had been claimed as deciding it *directly*, which is *nil ad rem*. The late case of Calmady v. Rowe, 6 C. B. 861, seems also to be very nearly decisive of the point, for it shows that acts of ownership, exercised by a lord of a manor upon the sea shore between high and low water mark, may be called in aid to show that the shore is parcel of the manor, where the ancient grant under which the manor is held does not expressly convey *littus maris*, though it conveys shipwrecks and wreck of the sea, which seems but a little distance from deciding that the sea shore passes as part of the manor.

*J. G.*

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ART. VIII.—ON THE PARTIES TO AN ACTION OF COVENANT WHERE THE COVENANTEES HAVE A JOINT INTEREST.

A CRITICISM of Mr. Preston's, in his edition of Shepherd's Touchstone, has given rise to so much discussion in some very recent cases in the Courts of Queen's Bench and Exchequer, not to mention the suspicion, which we believe unfounded, of a difference between the two courts upon an important question of pleading, that we are induced to devote a few pages to a consideration of the proper parties to sue in an action of covenant where the covenantees have a joint interest.

Remarking upon the principles laid down by his author upon the authority of Slingsby's case, Mr. Preston proceeds:—"On the subject of joint and several covenants, that eminent lawyer, Sir Vicary Gibbs, assumed that covenants must necessarily be joint or several, according to the interests. The language was, 'Wherever the interest of parties is separate, the action may be several, notwithstanding the terms of the covenant on which it is founded may be joint; and where the interest is joint the action must be joint, although the covenant in language purport to be joint and several.' With great deference, however," adds Mr. Preston, "the correct rule is, that, by express words, clearly indicative of the intention, a covenant may be joint, or joint and several to, or with, the covenantors or covenantees, notwithstanding the interests are several. So they may be several, although the interests are joint. But the implication or con-

<sup>1</sup> Duke of Beaufort v. Mayor, &c., of Swansea, 3 Exch. 413.

struction of law, when the words are ambiguous, or are left to the interpretation of law, will be, that the words have an import corresponding to the interest, so as to be joint when the interest is joint, and several when the interest is several; notwithstanding language which, under different circumstances, would give to the covenant a different effect. The general rule proposed by Sir Vicary Gibbs, and to be found in several books, would establish that there was a rule of law too powerful to be controlled by any intention, however express."

A consideration of the following cases will, as we believe, lead to the conclusion that so far as regards actions by covenantees having a joint interest, Mr. Preston's statement of the law is too comprehensive to be strictly accurate.

The leading (though by no means the earliest) case on this subject is *Slingsby's case*,<sup>1</sup> which was argued in Michaelmas Term, 29 & 30 Eliz., in a writ of error in the Exchequer Chamber. *Slingsby*, and *Frances*, his wife, brought an action of covenant in the King's Bench against *Roger Beckwith*, and declared on an indenture between the defendant *Roger Beckwith* of the first part, *William Vavasor*, *Francis Slingsby*, and *Elizabeth*, sister of the said *Roger*, of the second part, and *George Harvey* and the said *Frances* (then his wife) of the third part; and declared, that the said *Roger*, the defendant, by the said indenture had covenanted, promised and agreed to and with the said *William* and *Francis*, and to and with the said *George* and *Frances* his wife, and their assigns, and to and with each of them (*et ad et cum quolibet et quâlibet eorum*), that the said *Roger* was seised in fee of the rectory of A.; and on this covenant issue was joined, and the issue by *nisi prius* was tried for the plaintiff, and damages assessed; upon which judgment was given in the King's Bench. But in a writ of error in the Exchequer Chamber, it was resolved that the judgment was erroneous; for it appeared by the plaintiff's own showing in his declaration that the plaintiffs only could not maintain an action of covenant, but the other covenantees ought to have joined in the action with them, notwithstanding these words *et ad et cum quolibet et quâlibet eorum*; for as to these words this difference was agreed: when it appears by the declaration, that every of the covenantees hath, or is to have, a several interest or estate, then, when the covenant is made with the covenantees, *et cum quolibet eorum*, these words *cum quolibet eorum* make the covenant several in respect of their several interests. As if a man by indenture demises to A. black acre, to B. white acre, to C. green acre, and covenants with them

<sup>1</sup> 3 Coke's Reports, 18.

and *quolibet eorum* that he is lawful owner of all the said acres, in that case, in respect of the said several interests, by the said words *et cum quolibet eorum* the covenant is made several; but if he demises to them the acres jointly, then these words *cum quolibet eorum* are void, for a man by his covenant, unless in respect of several interests, cannot make it first joint and then make it several by the same or the like words *cum quolibet eorum*: for although sundry persons may bind themselves *et quemlibet eorum*, and so the obligation shall be joint or several at the election of the obligee, yet a man cannot bind himself to three, and to each of them, to make it joint or several at the election of several persons, for one and the same cause; for the court would be in doubt for which of them to give judgment, which the law would not suffer, as it is held in 3 Hen. VI. 44 b. There it appears that one brought a replevin against two persons for an ox, who made several avowries, each by himself in his own right; and there, by advice of all the justices, both the avowries abated for the inconveniency, that if both the issues should be found for the avowants, the court could not give judgment for them severally for one and the same thing. Also the covenantor in the case at bar would be divers times charged for one and the same thing; and therefore the said words *et cum quolibet eorum* are in such case but words of amplification and abundance, and cannot sever the joint cause of action.

Another case frequently referred to as a leading case on this subject, is *Eccleston and wife, executors, v. Clipsham*, decided in Hilary Term, 19 & 20 Car. II. The plaintiffs declared upon an indenture between Tayler of the first part, the defendant of the second part, and Castle, the testator of the plaintiffs, of the third part, whereby it was declared that all the said parties had an equal interest in the contract in the indenture mentioned: and thereupon each of them respectively, for himself, his executors and administrators, &c., covenanted and agreed *to and with the other and others of them respectively, and his and their respective executors, administrators and assigns*, in the manner in the indenture mentioned. Saunders, who reports the case,<sup>1</sup> took an exception to the declaration, on the ground that the covenant was joint with the plaintiffs' testator, and with Tayler, who survived the plaintiffs' testator, for though the covenant was joint and several by the words, yet the interest and cause of action was joint only; for it was an equal damage to Castle, the testator, and to Tayler, if the defendant had broken those covenants as by the declaration was supposed, and therefore they ought to have joined in the action, and Castle, the plaintiffs'

<sup>1</sup> 1 Saund. 153.



testator, being dead, the action was survived to Tayler, as in Slingsby's case, which he quoted. The learned editors of Saunders (Patteson and Williams) observe, in a note to this case, in allusion to a reference of Serjeant Williams to the judgment in Slingsby's case: "From what has been said, and which has since been acknowledged to be good law, it is clear that the insertion or omission of the words *cum quolibet eorum* can make no difference to the covenantees, but the action will in all cases follow the interest without regard to the words of the covenant."

The next case is that of *Spencer v. Durant*, tried in B. R. anno 1 W. & M., and reported by Comberbach.<sup>1</sup> This was an action of covenant on articles of agreement between several fiddlers, that they would not play, &c., asunder, unless on my Lord Mayor's Day, &c., and they were bound in 20*l.* each to the other jointly and severally, and one only brings covenant and assigns the breach that the defendants played *ad quandam tabernam*, &c. Judgment was given for the defendant upon the principle of Slingsby's case, for they ought all to have joined, the interest being joint, and it was repugnant and contradictory for four persons to bind themselves the one to the other jointly and severally.

In *Saunders v. Johnson* (Michaelmas Term, 5 W. & M. in B. R.),<sup>2</sup> the action was brought by the herald painters *et pro quolibet et singulis eorum*, that they should bring their work to such a place and that there such work should be done, and that the money paid for such work, when it should be received, should be brought to the aforesaid place and divided between them in certain parts and proportions; and because one of the covenantors did not bring his work to the place aforesaid there to be worked, the others brought an action of covenant against him, and judgment being by default, and a writ of inquiry of damages awarded and returned, it was moved in arrest, because the covenant was brought jointly where it was a several covenant, and therefore ill, according to the rule of Slingsby's case; and here the damages being in the place of the profit which they ought to have for the work, as such profit had been several, so their damages ought to be so likewise. The action was adjudged to be well brought, for it was founded upon the work not being brought to the place appointed for it, and in this part the covenant was joint, for they all had an interest and right jointly that the work should be brought there in order to be done, and though the words of the covenant were several, yet the subsequent matter and interest being joint, the covenant

<sup>1</sup> Comb. 115.

<sup>2</sup> Skinner, 401.



should be joint also, and therefore the action there being joint it was well brought, and after being twice moved, judgment was given for the plaintiff.

The last cases we shall refer to, before coming to the consideration of those determined in our own times, are those of *Scott v. Godwin*, determined in K. B., 37 Geo. III.,<sup>1</sup> and *Anderson v. Martindale*, determined four years later. In *Scott v. Godwin* the reversion of land demised to the defendant for years was conveyed to John Scott and Robert Scott, and the heirs of Robert Scott, in trust for John Scott and his heirs. John Scott declared singly on a covenant contained in the lease. In delivering the opinion of the court, Eyre, C. J., after premising that he took it to be most clear that the operation of law upon the deeds stated by the plaintiff was to constitute John and Robert Scott joint assignees, continued, "the effect of this is, "that the defendants' covenants became also by operation of "law contracts with John and Robert Scott jointly, and that all "causes of action to them arising out of these contracts must "follow the nature of the contracts, and must arise to John "and Robert Scott jointly. In fact, John Scott has declared on "a covenant made with John and Robert Scott, but has supposed himself capable of sustaining an action alone for the "breach of it. Now that this is fundamentally wrong there "can be no doubt, and the principle on which it is wrong was "not denied in the argument. . . . Many plaintiffs can "have but one right, having but one interest and one cause of "action, which ought to be, and is, indivisible, admitting of but "one satisfaction. But if in the nature of the thing, if on principles of law or authorities, it could be that a man should "derive a several interest out of a joint obligation to himself "and others, and that plaintiffs could sue separately for their "portions of one right, it is most obvious that it must vex and "harass defendants extremely. That this cannot be appears "from *Slingsby's case*, and from the principle of those passages "cited from *Co. Litt.* which show that joint tenants must plead "and be impleaded jointly. Whereas in the case of defendants, "in respect of the satisfaction they are to make to the plaintiff, "it is exactly the same thing whether they are sued singly or "with others, for every individual co-defendant is ultimately "liable to the whole demand, and execution may be had against "every one. . . . I take it to have been solemnly adjudged "in several cases, and to be the known received law, that one "co-covenantor, one co-obligor, or one joint contractor by parol, "cannot sue alone. In the last case it is common experience,

<sup>1</sup> 1 Bos. & Pull. 67.

“ that where a joint contract appears in evidence on the general  
 “ issue the plaintiff is nonsuited, and there are many cases in the  
 “ books in which it has been held to be error for one co-obligee  
 “ or one co-covenantee to sue alone. . . . The case of *Eccleston*  
 “ v. *Clipsham* and *Slingsby*’s case were both in covenant, and so  
 “ directly in point. . . . A breach of a joint contract with  
 “ two or more cannot be joint and several. This plaintiff could  
 “ not sue alone, and therefore we are of opinion that there must  
 “ be judgment for the defendant.”

The case of *Anderson v. Martindale*,<sup>1</sup> determined in the King’s Bench in Trinity Term, 41 Geo. III., carried the principle of *Slingsby*’s case still further, deciding that the necessity of suing jointly depends neither on the frame and wording of the covenant, nor on the quality of the interest, provided such interest be joint in law, a joint legal interest in two covenantees, though for the benefit of one of them only, rendering it necessary to sue jointly. There the covenant was with J. Anderson, deceased, his executors, administrators and assigns, and also to and with E. Wyatt and her assigns, to pay to the said J. A., his executors, administrators or assigns, 60*l.* per annum during the life of E. W. It was argued that the covenant was several, and not joint; the defendant covenanted to and with J. A., his executors, &c., and also to and with E. W. and her assigns; this was a distinct covenant to each of them, and the variance in the expression showed that it was so intended. It was true that such a construction made the defendant liable to two actions; but that was his own fault, for binding himself to two persons for an act to be done only to one of them. If he had so bound himself to each by two different deeds, the covenantees could not have sued jointly; then it made no difference if there were several covenants to several persons in the same deed. But if the covenant were several, though the interest were joint, the right of action must be several. Such was the argument for the plaintiff. But Lord Kenyon, C.J., decided that there was no distinguishing *Slingsby*’s case from the present; and after recapitulating the particulars of that case, and repeating the principle upon which it was decided, viz. that where the interest is joint, if several were to bring actions for one and the same cause, the court would be in doubt for which of them to give judgment, continued,  
 “ So here, I should say, here is a covenant to two to pay an  
 “ annuity to one of them; shall both bring actions for the same  
 “ interest where only one duty is to be paid? Which of them  
 “ ought to recover for the non-performance of the covenant?

<sup>1</sup> 1 East, 497.

“ The defendant is only bound to pay the annuity once. This  
“ is different, therefore, from the case put by Lord Coke, where  
“ the covenant is to several for the performance of several  
“ duties to each ; there the covenant shall be moulded according  
“ to the several interests of the parties, and each shall only  
“ recover for a breach so far as his own interest extends. It  
“ has been assumed in the argument for the plaintiff that the  
“ covenantees had several interests, but that is not so ; the  
“ covenant to both was for the same thing ; and though the  
“ benefit were only to one of them, yet both had a legal interest  
“ in the performance of it ; and, therefore, the legal interest  
“ being joint during the lives of both, on the death of one it  
“ survived to the other. If, indeed, the covenant had been to  
“ each by two different deeds, though for the same duty, there  
“ could not have been a joinder in action ; but here the parties  
“ claim by the same title, and therefore the law coincides with  
“ the justice and convenience of the case.”

We now come to consider the difference of opinion which has been supposed to prevail with respect to these covenants in the Courts of Queen's Bench and Exchequer, but which, if we except certain dicta of the latter appearing to be extrajudicial, we believe to have no real existence.

The Court of Queen's Bench has uniformly acted on the principle maintained by the preceding and a long series of other judicial decisions. In the case of *Foley v. Addenbrooke*,<sup>1</sup> tried in that court in Hil. Term, 6 Vict., the indenture showed a joint demise by Edward Foley and his wife and Mary Whitby, and the covenants were with Foley and his wife and Mary Whitby, and the heirs and assigns of the wife and Mary Whitby respectively. Upon reference to the indenture only, as set out in the declaration, it appeared that Foley and his wife and Mary Whitby had such an interest as enabled them jointly to demise the whole of the premises. It appeared, however, by the inducement, that Foley and his wife had only an undivided moiety : and therefore it was, as the court held, to be inferred, though her interest was not shown by averment, that Mary Whitby had the other moiety, making up the whole interest in the premises. Upon this view of the facts, the court was of opinion that, the demise being joint, and the covenants upon which the action was brought entire, and made with both the lessors, the cause of action was joint, and that both the covenantees ought to have sued, though, as between themselves, their interest might be separate. Lord Denman, C. J., in delivering the judgment of the court,

<sup>1</sup> 4 Q. B., 197.

referring to the cases already cited, concluded: "In the present case the covenants, for breach of which the action is brought, are such as to give the covenantees *a joint interest in the performance of them*: and the terms of the indenture are such, that it seems clear that the covenantees might have maintained a joint action for breach of any of them. Upon this point the case of *Kitchen v. Buckley*<sup>1</sup> is a clear authority; and the case of *Petrie v. Bury*<sup>2</sup> shows that, if the covenantees *could* sue jointly, they are bound to do so."

The case of *Foley v. Addenbrooke*, though fully maintaining the principle of *Slingsby's* case, left the law very much as it stood before. But the next case of importance in the Queen's Bench, that of *Hopkinson v. Lee* (argued in Hilary Vacation, 8 Vict.),<sup>3</sup> applied the principle to a new form of covenant, devised apparently upon the strength of Mr. Preston's criticism already quoted. There the covenant was "with and to Jonathan Hopkinson, his executors, administrators and assigns, *and also as a distinct covenant with and to Anne Caroline Hogg, her executors, administrators and assigns.*" The instrument in which this covenant was contained recited, that the defendant had borrowed of the plaintiff 2900*l.*, part of the monies of Ann Caroline Hogg then in his hands in trust for her, on the security of a mortgage; and that the plaintiff having required some further security, the defendant proposed to enter into this covenant for securing the same; and that the plaintiff and A. C. Hogg were satisfied therewith, and agreed to accept the same, and to advance the sum of 2900*l.*; and it was witnessed, that in pursuance of this agreement, and in consideration of the premises and of the advance of the said sum to the defendant, the defendant covenanted, in the words quoted above, to pay the plaintiff, his executors, administrators or assigns, regular interest on the 2900*l.* In delivering judgment in this case Lord Denman, after a very just criticism on Mr. Preston's observations, relied on the case of *Anderson v. Martindale*. "This language," his lordship continued, referring to the words of the covenant in that case, "as entirely confines the covenant to the plaintiff, and makes another separate covenant with E. Wyatt, as any words not directly exclusive can make it. In *Slingsby's* case the covenant was with certain persons named '*et ad et cum quolibet et quâlibet eorum.*' No words can be stronger to give the plaintiff an option to sue all jointly or each separately. Yet in both the court held, that by reason of the joint interest in the subject-matter of the suit, as disclosed in

<sup>1</sup> 1 Leo. 109.<sup>2</sup> 3 B. & C. 353.<sup>3</sup> 6 Q. B. 964.

“ the deed itself, the action must be joint. We think it would  
 “ be waste of time to argue that the words ‘ as a distinct cove-  
 “ nant’ do not furnish any stronger inference of the intention to  
 “ exclude than those just cited from those well known cases.  
 “ If they are still law, the present case must be decided against  
 “ the plaintiff. We see no ground for doubting whether they  
 “ are.”

Such being the uniform tenor of the decisions of the Court of Queen’s Bench, we proceed to examine those of the Court of Exchequer. The most prominent cases which have been mentioned as indicative of a difference of opinion between the courts upon the subject of this paper, are those of *Sorsbie v. Park*, and *Keightley v. Watson*. The former, however, with the exception of some extrajudicial remarks of the learned judges, and which, if rightly understood, would scarcely form an exception, so far from impugning, directly supports the principle decided by the long series of judicial authorities above mentioned; while the latter, when examined, proves to be altogether beside the question before us, the interests of the covenantees in that case being clearly several and not joint.

In the case of *Sorsbie v. Park*,<sup>1</sup> the declaration stated that the defendant and others, having formed a scheme for erecting by subscription a corn market at Newcastle-upon-Tyne, executed a deed-poll, whereby they severally covenanted *to and with each other* to advance and pay the several sums of money subscribed and placed opposite their respective names for erecting the corn market within four years, and also to make such payments in respect of the said shares as the committee should deem expedient; and the subscribers and the defendant severally promised and agreed *with the plaintiffs*, in case of the default of the committee to require such payments within four years, then to make such payments unto such persons, and in such proportions, as should be required by the plaintiffs. It then averred that the plaintiffs did not subscribe any sum of money, but became parties to the deed for the reasons in the declaration mentioned; that the defendant subscribed to the deed for the sum of 500*l.*; that the committee made default in requiring any payment from the shareholders or the defendant within four years; wherefore the plaintiffs, after the said four years, required the defendant to pay 150*l.* in respect of his shares. Breach, the non-payment thereof. The court was to be at liberty (*inter alia*) to refer to the deed-poll; and on reference to it, it appeared that the covenant was by the subscribers *to and with each other*,

<sup>1</sup> 12 M. & W. 146.

*und to and with the plaintiffs.* The court held that this was *primâ facie* a joint covenant with the subscribers and the plaintiffs, and not a several covenant with the plaintiffs alone. Secondly, that it did not appear from the deed that the plaintiffs had a separate interest, and that the subscribers and the plaintiffs ought to have sued jointly. Parke, B., adding, "The terms of this instrument being a contract *primâ facie* with the plaintiffs and the other subscribers jointly, there appears to me to be no expression of interest in the deed to enable us to construe its terms otherwise, and consequently they ought all to have sued jointly."

The very recent case of *Keightley v. Watson*<sup>1</sup> (Exch. East. T. 12 Vict.), in which it was held that the plaintiff might properly sue alone, proves on examination, as we have already intimated, to belong to another class of cases, essentially different from those we have examined. There the action was by Keightley on an indenture executed by Dobbs of the first part, the plaintiff Keightley of the second part, and the defendants of the third part. The deed, after reciting that Dobbs had agreed to purchase certain land of the plaintiff, which same land Dobbs had agreed to sell to the defendants, contained a covenant by each party thereto, that Dobbs should sell and the defendants should purchase the land at 7335*l.*, 900*l.* to be paid on the execution of the deed, and 6435*l.* on the 27th November, 1851. Then followed the covenants upon which the action was brought, which was a covenant by the defendants "with Keightley, his executors, administrators and assigns, and as a separate covenant with Dobbs, his executors, administrators and assigns," on the performance of the covenant thereinbefore contained on the part of Dobbs, to pay to Keightley, or to Dobbs in case Keightley should then have been paid his purchase-money, the sum of 6435*l.* on or before the 27th of November, 1851. And further, that the defendants should in the mean time pay to Keightley interest on so much of the purchase-money as should from time to time remain unpaid.

It is needless to transfer to our pages the reasons for which the court held that, under these circumstances, there were two distinct and separate interests, and that the case was clearly distinguishable from that of *Hopkinson v. Lee*, *because on the face of the instrument before the court the parties had separate interests, so that the court was called upon to construe a separate covenant according to the precise words of it.*

It should be added that, while, as we have endeavoured to

<sup>1</sup> 3 Exch. 716.

show, the Court of Exchequer has delivered no judgment at variance with the principle to which we have so often referred, more than one case might be cited in addition to that of *Sorsbie v. Park*, in which that court has held that where the deed containing the covenant has disclosed a joint interest, and no separate interest, one of two or more covenantees can not sue alone. It will suffice here to refer to the cases of *Lane v. Drinkwater*,<sup>1</sup> and *Bradburne v. Botfield*,<sup>2</sup> in the latter of which the covenant was in form a separate covenant.

Although the subject of this paper confines our attention to actions of covenant, by covenantees having a joint interest, it may not be improper to add that, where the deed containing the covenant discloses an interest in the covenantees which is clearly several, a covenant which is joint in form may be sued upon by one covenantee alone. It follows, therefore, *à fortiori*, that under the like circumstances the same liberty will be allowed where, as in *Keightley v. Watson*, the covenant is as clearly separate in form. For the convenience of our readers we may refer to the following cases in illustration of the rule which obtains where the interest of the covenantees is several. *James v. Emery*, 8 Taunt. 245; *Withers v. Bircham*, 3 B. & C. 254; *Story v. Richardson*, 6 Bing. N. C. 123, 129; *Poole v. Hill*, 6 M. & W. 835; *Palmer v. Sparshott*, 4 Scott, N. R. 743; *Owston v. Ogle*, 13 East, 538; *Servante v. James*, 10 B. & C. 410; *Mills v. Ladbroke*, 7 M. & G. 218; *Harrold v. Whitaker*, 11 Q. B. 161.

<sup>1</sup> 1 Cr. Mee. & Ros. 599.

<sup>2</sup> 14 M. & W. 559.

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## ART. IX.—THE LAW AMENDMENT SOCIETY.

WE take some blame to ourselves for not having ere this made "The Law Amendment Society" the subject of special notice. Our omission to do so was in the first place designed; inasmuch as it seemed expedient that a society aiming at ends of no limited compass, and of boundless importance to the jurisprudential interests of all civilized nations, should be put to the test of time and actual experience in its working, ere any fitting or safe judgment could be passed upon it. If it failed (as many certainly prognosticated it would), its promoters would have deserved, besides the expression of mere pity at their failure, some degree of censure for the magnitude of an enterprise they had no adequate power to work and to sustain, inasmuch as to fail therein would have seriously impeded other and better efforts for the same good objects. A notice which should have been too premature to anticipate either failure or success with any sufficient certainty, would have done no good, and might, had it said anything, have done mischief; either by exciting undue expectations in the public mind, and thus heightening the ill effects of disappointment; or on the other, by discouraging the germs of success with such faint praise as incipient efforts, in the infancy of the experiment, could alone have warranted. The interests at stake were too catholic and important to admit of other feelings being thrown into the scale.

The Society has now far outlived its probationary noviciate. "It is," in the words of its last Report, "no longer a speculation." It has grown into a degree of efficient and acknowledged utility, such as render praise a public duty rather than a mere act of justice; and though we have long since accorded our humble meed of approval to its labours, we have deferred any detailed notice of them, until we were enabled to attest and fortify our opinion by the best of all proofs of success; namely, the actual fruits the Society has brought to bear.

Before doing this, let us briefly set forth what are the objects and sphere of operation which the Society has prescribed to itself:—

Its purpose, to use the terms of its Report, is to collect and diffuse all information which can tend to the simplification and improvement of the Law—to suggest the means by which, it believes, that the administration of justice may be rendered less

dilatory, less expensive, and less uncertain—to add to the value and security of real property, by facilitating its transfer—to aid personal rights, and to defend from personal wrong. Thus when a subject is suggested, being approved for discussion by the council, and investigated by a committee, it is debated in general meeting of the whole Society. It is designed that nothing be done hastily, without publicity, or without opportunity for deliberation. The result has been the printing of reports on many most important subjects, of which several have attracted the attention of the legislature, and some have become the foundation of legislative enactment. It is on this faculty of suggestion that the Society affirms that it mainly relies for its success—*petimusque damusque vicissim*; it asks hints, not from the learned only, but from all who suppose they see an evil with its remedy or improvement. On these hints they work, and present the results to those who hold such station as may render them effective.

Thus, therefore, the results of individual reflection and experience are gathered in and sifted and made of practical utility by the collective judgment of the whole body.

We apprehend that a better system of reaping, winnowing and harvesting the scattered fruits of a practical science could not be devised, and it reflects infinite credit on the skill and discretion of its originators. It appears to us to have been attended already by a very encouraging amount of success.

We are glad to find the Court of Chancery has especially engaged the attention of the Society, and has, in their estimation, “the unenviable pre-eminence of suggesting itself to popular opinion as the first object of Law Reform,” whilst there is another and a “higher tribunal well entitled to dispute its precedence—the High Court of Parliament—not in its political, but in its legislative, capacity—not in any question of the purity of its intentions, but in respect of its incapacity to convey those intentions in reasonable language.”

“The Court of Chancery (well observes the Report), inaccessible to the poor, vexatious to the rich, dilatory and expensive to all, with a theory almost perfect in its equities, with a practice almost unequalled in its imperfections, was almost, as of course, the first to receive their attention. That any private Society should have attempted to grapple with this monster evil may be held as no inconsiderable degree of presumption. Royal and parliamentary commissions have failed; new rules and orders, and again new rules and orders, framed with all the skill, experience, diligence and astuteness which judicial talent and integrity of purpose could bring to their consideration, have not

yet produced the desired certainty of practice, the desired speed of procedure, the much-desired cheapness of relief. And yet the Society hopes to succeed, because in addition to competent knowledge they have members who bring to the work of renovation minds unfettered by ancient habit; not working in a groove, worn deep by continual use; minds in which respect has not become veneration; new minds, active in discovering the sources of evil, though as yet immature for the suggestion of remedy."

The modest "hopes" of the Society that it will succeed, have been already crowned with practical proofs of its utility. Here is a list of the actual effects produced by it in this one branch of its labours, which, for greater clearness, we have thus tabularised:—

#### LAW OF PROPERTY.

Report.	When received,	Acts of Parliament under which the Recommendations have been carried into Effect, or other Results which have attended these Reports.
1. Recommends the vesting of trust property in trustees, on their appointment, without conveyance	July 31st, 1844 ..	13 & 14 Vict. c. 60, s. 34.
2. Recommends the facilitating the appointment of new trustees, where the existing power for that purpose is imperfect.	Feb. 5th, 1845 ..	13 & 14 Vict. c. 60, s. 38, and passim.
3. Shortening deeds.	April 9th, 1845 ..	8 & 9 Vict. c. 119, c. 124.
4. Merging attendant terms.	July 9th, 1845 ..	8 & 9 Vict. c. 112.
5. Uses and trusts—recommends the assimilation of legal and equitable estates.	Feb. 4th, 1846 ..	
6. Law of mortgages—recommends a more satisfactory mode of reconveying mortgage estates.	April 8th, 1846 ..	
7. General register of deeds.	May 6th, 1846 ..	A plan nearly similar to this recommended by the Conveyancing and Registration Commissioners in their First Report, 1st July, 1850.

Report.	When received.	Acts of Parliament under which the Recommendations have been carried into Effect, or other Results which have attended these Reports.
8. Adapting the machinery of the public funds to the transfer of real property.	June 3rd, 1846 ..	Considered in detail by the Conveyancing and Registration Commissioners, but not for the present adopted. 1st Report, ut supra.
9. Insurance of titles.	Dec. 2nd, 1846 ..	Considered by the Conveyancing and Registration Commissioners, but not for the present adopted. 1st Report, ut supra. This plan has been attempted to be carried out by several private companies, none of which, however, has had the sanction of the Society, or of any of its members.
10. General map of the lands of England and Wales.	April 28th, 1847 ..	The adoption of a map, in connection with a register of deeds, has been recommended by the Conveyancing and Registration Commissioners. 1st Report, ut supra.
11. First part of Report on the law of landlord and tenant.	Feb. 2nd, 1848 ..	The recommendations contained in these Reports have been adopted by the committee of the House of Commons on Agricultural Customs (Report printed 3rd July, 1848,) and a bill founded on this Report has twice passed the House of Commons.
2nd part of ditto.	March 22nd, 1848	

This appears to us fully to warrant the praise we have awarded to this painstaking and useful Society, and on which alone they may safely base their appeal to "the public for a larger measure of co-operation and support."

As some inaccuracy as to the time at which the Society was founded has occurred, it may be proper to mention that its first meeting was held on the 4th of January, 1844.

It appears to be peculiarly important that all lawyers and statesmen, who feel that they can add any kind of aid to the objects of the Society, should at once join its ranks. Whatever may be meritorious in their views and suggestions will derive form and strength from its collective power of modelling and making known. Whatever is crude and impracticable will, after due consideration, be extinguished, with perhaps as much benefit to the author as to the public.

We shall in another article complete our summary of the actual results of the Society's labours, and also offer some additional comments on the probabilities and capacities of its future and still more extended utility.

We regard the oath therein prescribed to those who avail themselves of its privileges, not merely in the light of an individual agreement, but as the formal expression and embodiment of a solemn compact between the Romanists on the one hand, and the Protestant realm and people on the other : whereby and in virtue whereof the one sought and the other gave emancipation. Perhaps no Act of Parliament was ever consummated after a more mature and extended discussion among all ranks and orders of the people. The grant and the acceptance were as little a compact between the leaders of a party and the ministers of the crown, and as much the act of the two great bodies of the people themselves, as any measure which has passed into a law since the sealing of Magna Charta. We believe it therefore to be past dispute, that the oath prescribed by that act declares not only the condition on which the three Protestant estates admitted the Roman Catholics to a full share in civil privileges, but that it also expresses the solemn ratification on their part of the condition imposed upon them, and in reliance on whose good faith in observing it, the boon was granted and the compact made.

The oath runs as follows, after the abjuration of the opinion that princes excommunicated may be deposed or murdered : " And I do declare that I do not believe that the Pope of Rome, or any other foreign prince, prelate, person, state or potentate, hath or ought to have any temporal or civil jurisdiction, power, superiority or pre-eminence, directly or indirectly, within this realm." And there presently follows this notable passage : " And I do hereby disclaim, disavow, and solemnly abjure any intention to subvert the present *church establishment* as settled by law within this realm ; *and I do solemnly swear that I never will exercise any privilege to which I am or may become entitled, to DISTURB or WEAKEN the PROTESTANT RELIGION or Protestant Government in the United Kingdom.*" These latter words constitute the most vital part of the oath. They are utterly irreconcilable with an appointment of new bishoprics, and a measure of which one of the avowed objects is to procure converts from the Protestant religion, and therefore in the most direct way to " weaken " it. It cannot be said that this new hierarchy is a necessary ingredient in the free exercise of Roman Catholic faith and worship, or that the form of government by Vicars Apostolic instead of Bishops is, as Dr. Bowyer contends, merely a "*temporary and provisional one,*" and such only as the Church of Rome uses "*in countries where she is barely tolerated,*" for she has done without them in this country for three centuries, during the early part of which she was not only

“barely tolerated,” but so powerful and considerable that her re-establishment was more than once well nigh achieved ; whilst her perfect freedom from every species of disability has been consummated for the last one-and-twenty years. These facts then demonstrate that the new measure is not the mere natural fulfilment of the Catholic system of worship within itself, but that it is designed as a means of aggression upon those without—a means for which we have endeavoured to show it is admirably adapted and most skilfully devised. Now if this be so, it is not only an act of aggression against Protestantism, but it is a direct breach of faith within the terms of the compact embodied in the Emancipation Act.

Dr. Bowyer significantly omits all notice of the latter part of the oath in his first pamphlet, whilst he puts forth and answers only the first part ; from which he ingeniously infers that—“the legal effect of this statute is, by distinguishing between the supposed temporal and spiritual jurisdiction of the See of Rome within this realm, and excluding the former only,—to permit by the most manifest implication the Roman Catholic subjects of the crown, to hold that the See of Rome has *spiritual* jurisdiction in the dominions of the British crown *over themselves*.” But had Dr. Bowyer given the sequel it would as clearly have appeared, not merely by implication, but by express declaration, that such jurisdiction, whether spiritual or temporal, embraced in the all-comprehensive term “privilege,” was not to be so used as to **DISTURB OR WEAKEN** *the Protestant religion*. And this is the very head and front of the moral offence charged upon the late aggressive measure : and we have been thus careful to detail the grounds on which we conceive it to be not only fraught with vast and vital peril to Protestant interests, but in itself a treacherous and faithless act, because were it less than this we should have refrained from the duty which devolves upon us of disclosing the actual illegality of the Papal Letter—of unveiling the error, as we believe it to be, on which the new Cardinal and his advisers are reposing in fancied security against the penalties of a law which they imagine they have successfully evaded.

As regards the statute of 10 Geo. IV. c. 7, we perfectly agree with the able reasoning of Dr. Bowyer, that “it is clear that the act forbids the assumption and use not of the style and title of archbishop, bishop, or dean of any place whatever, in England or Ireland, but only of any archbishopric, bishopric, or deanery belonging to the Established Church. *Expressio unius est exclusio alterius*. And we may infer that the assumption and

use of new ecclesiastical titles not belonging to the Establishment is lawful."

But the great mistake into which the Papal party have fallen is in the assumption that they have any power or right to send a Bull or Letter such as this to this country, or to put it in force, more now than formerly. The 13th of Eliz. c. 2, after reciting in the preamble a former act, against attributing "any manner of jurisdiction" to the Bishop of Rome in these dominions, goes on to denounce the effect of his "divers. Bulls and Writings" as having absolved and reconciled men to yield themselves subject to the said authority, and "to take absolution at the hands of certain naughty and subtile practisers," whereby "hath grown great disobedience and boldness in many, not only to withdraw and absent themselves from all Divine Service, now most godly set forth and used within this realm;" which, with other evil effects, "are hereafter very like to be renewed." Then follows section 2, in which Bulls or Instruments for such purposes (as aforesaid) are set forth together with Bulls of Absolution. Section 3 then continues the category in these all-comprehensive terms:—"Or if any person or persons, after the said first day of July, shall obtain or get from the said Bishop of Rome, &c., *any manner of Bull, Writing or Instrument written or printed, containing any thing, matter or cause whatsoever*; or shall publish, *or by any ways or means put in ure* any such Bull, Writing or Instrument; that then all and every such act and acts, offence and offences shall be deemed and adjudged by the authority of this Act to be High Treason; and the offender and offenders therein, their procurers, abettors and counsellors to the fact and committing of the said offence or offences, shall be deemed and adjudged High Traitors to the Queen and the Realm." The Common Law offence of high treason is thus declared to apply to the mere sending, &c. of the said bulls, writings or instruments.

The section then enacts as follows: "and being thereof lawfully indicted and attainted according to the course of the laws of this realm shall suffer pains of death; and also lose and forfeit all their lands, tenements, hereditaments, goods and chattels, as in cases of high treason by the laws of this realm ought to be lost and forfeited." The 4th section then enacts, "that all aiders, comforters or maintainers after the committing of such acts shall incur the penalties of præmunire."

They understood how to draw statutes in those days: and it is obvious that, supposing this to be in force, there is no escape from the terrible grasp of its terms. It is generally believed that it has been repealed by the 9th & 10th Vict. c. 59, which repeals



the above cited 13 Eliz. c. 2, "SO FAR ONLY *as the same imposes the penalties or punishments therein mentioned* : but it is hereby declared that nothing in this enactment contained shall authorize or render it lawful for any person or persons to import, bring in, or put in execution within this realm any such bulls, writings or instruments, and *that in all respects, save as to the said penalties or punishments, the law shall continue the same as if this enactment had not been made.*"

Thus this clause not only limits its repealing enactment to the penalties imposed in the section above cited of the 13th of Eliz., but it expressly re-enacts the rest. Now, in the rest, the entire mischief of the statute of Eliz. is comprised. The offence described is made high treason; and, moreover, the part repealed, setting forth the punishment, was a lenient provision when it was enacted; for a worse punishment than mere death was then attached by common law to the offence, without any enactment at all. And this comparatively mild clause is all that the 9 & 10 Vict. c. 59, repeals; for it limits the repeal to the express penalty which "*the same*" (i. e. the Act of Elizabeth) imposes: necessarily, therefore, leaving the offence liable to the penalty which would have been inflicted had the clause in that Act stopped at the words "high traitors to the Queen and the realm." Now the offence therein described was that of *crimen lesæ majestatis*, which was then the terrible one of drawing to the scaffold, of disembowelling while alive, half-hanging, decapitation and quartering (4 Black. Com. 92 & 93; 1 Hale, P. C. 382; Coke, 3 Inst. 211). And the fact is, that the concluding clause in the 13th of Eliz. was inserted in misericordiâ, as a modification or lessening of the full punishment which the law would otherwise have then inflicted, and, be it observed, which the 9th & 10th Vict. c. 59, thus *actually restores*: for inasmuch as the simple and milder penalty of mere death is repealed, and the offence retained, the punishment *then* attached to it by the common law revives. Nor does the 54th Geo. III. c. 146, help it; for that statute, which enacts an alleviation in the punishment of treason, is restricted to those cases only in which, as the law *then stood* (in 1814), the sentence required by law to be pronounced, was the disembowelling while alive, &c. Now the 13th of Eliz. did not then require it, so that it is untouched by the statute of Geo. III. c. 146; and all that the statute of 9 & 10 Vict. has done has been to affix the horrid form of execution to the statute of Elizabeth, which its more careful framers expressly avoided.

Thanks to the enlightened Christianity of these times, and to our increased humanity, our greatly *decreased* skill in law-

making will place Cardinal Wiseman and his counsellors in no peril of their lives; but that they have committed high treason under the 13th of Elizabeth is to our minds incontestable, unless it can be successfully argued that they do not put themselves within the mischief of the statute. But when we dwell on the all-comprehensive grasp of the carefully selected words of the clause, to embrace every kind of *papal* "*instrument or writing,*" "*containing any thing, matter or cause whatsoever,*" and when the offence is declared to be equally perpetrated by publishing, or using, or procuring such instrument, or in aiding or abetting those who do either of these, we confess we have looked in vain for the loophole through which the dexterity of a Vatican of casuists can creep.

Sir Edward Sugden is of the same opinion. Mr. Anstey, though he mistakes the real penalty (which, indeed, all seem to have overlooked), thinks also the statute in full force. Mr. Warren, in his eloquent pamphlet, cites Reeves, Hallam, and even Lingard, in its support. We deny that where the offence is left plainly expressed, as that of high treason, that an indictment for mere misdemeanor under it would lie; although where "*a statute (merely) commands or prohibits anything of public concern, the person guilty of disobedience is liable to be indicted for the disobedience.*" Hawk. Pl. Cr. b. i. c. 22, § 5. See also Bac. Abr. tit. Stat. K.

Some means are required of repressing the advances of the Roman Catholic religion in the country at this time, beyond those furnished by the mere efforts of reason. Moreover, the sword of the Spirit (which must ever be the first and highest, and, under God's blessing, the most effective weapon against the machinations of Rome) should be aided and defended by the arm of human law, temperately and wisely but firmly exerted. This we hold to be its legitimate use, and imperatively required of our rulers by the emergency of the peril which now besets the strongholds of our glorious Protestant faith. Against the slightest efforts of intolerance we should be among the first to move; but every motive of reason and of justice, and above all, the sacred claims of religious liberty, demand of our Protestant Empire and our liberal Government, that acts avowedly aggressive on our faith should be resisted, when made by a Church whose power has ever thriven as conscience became enslaved, and whose strength is proportioned to its means of suppressing the independent judgment, and moral and mental vigour of the people over whom it rules.

This we believe to be the most formidable statute against the present aggression, notwithstanding that Mr. Barnes, in his

“Letter on the Papal Brief,” very hastily and most erroneously says, that “with exceptions very unimportant, all statutes against the Roman Catholics since the first of Elizabeth are repealed. We shall presently comment on one or two statutes previous to that of 13 Eliz., which have been deemed more or less applicable to the case of this aggression; but it will be convenient to do so in the course of a more detailed notice of the last-named of the pamphlets at the head of this article, and which Dr. Bowyer will have published ere this number reaches the hands of our readers.

Dr. Bowyer, in this new pamphlet, labours hard to reconcile the Papal measures with perfect allegiance to the Crown and non-aggression towards the Protestant faith. Dr. Bowyer is not only a highly educated gentleman, and a profound lawyer, and a sincere Roman Catholic from conviction, but his pamphlet, entitled “Roman Documents,” is issued as

“By Authority.”

We feel, therefore, that we are doing the largest measure of justice to the Roman Catholic body by taking him as the exponent of their sentiments, more so on a subject partly legal, than by citing the appeal of the Cardinal himself, who may also—able and dignified as is his style—be deemed a less disinterested and dispassionate witness.

“We have proved the notion, that the style of a diocesan bishop taken from the place where his *see* or *seat* is planted can be termed a ‘territorial title,’ to be utterly unsupported by authority, and contrary to ecclesiastical law and history; that the name of Bishop of a town or city never meant anything more than that his *cathedra* and *cathedral* are erected there, for which reason Catholic bishops are always called by the name of a place and not by that of a district; and that bishops with the supposed ‘territorial titles’ existed even while the Church was proscribed and persecuted by the civil power.

Now, to say that the title of Bishop of Shrewsbury, for instance, does not mean more than the name of a see where a cathedral is, and therefore cannot be a territorial title, is mere special pleading; the fact being, that besides this historical meaning it also designates a certain accurately-defined district of England and Wales, which is as completely a territorial distinction as it is possible to conceive any title to convey. Quite as much so as the term Archbishop of Canterbury; and Dr. Bowyer may just as well argue that that title is not territorial, but only indicative of the seat of sovereignty. What says Lord Beaumont on this point:—“To send a Bishop to Beverley for the spiritual direction of the Roman Catholic clergy

in Yorkshire, and to *create a See of Beverley*, are two very different things—the one is allowed by the tolerant laws of the country; *the other requires territorial dominion and sovereign power within the country.*” Common sense also says that a title which designates a defined territory is a territorial title, and Dr. Bowyer’s learning will hardly persuade us otherwise.

“We have demonstrated that the bare office of a diocesan bishop, such as the bishop of Birmingham or Clifton, is not a dignity in the sense in which the Crown is the fountain of honour and dignity; that it was in existence long before the common law, or any dignity known to the common law was invented—that the office is not, and never was a dignity at common law, and the writers on dignities consequently pass it over in silence; and that the legal privileges sometimes annexed to bishoprics, such as those belonging to bishops of the Established Church, are merely accidental—not appertaining to the office of a diocesan bishopric, which is a purely spiritual office with cure of souls. And indeed, whereas all dignities are creations of the royal prerogative, the Crown cannot create a new bishopric even in the Established Church, and still less can the Crown or the legislature itself make a Roman Catholic bishop. Where then is the aggression upon, or usurpation of, her Majesty’s prerogative? The Pope has done what no other authority on earth could do, and it necessarily follows that he has therefore neither usurped nor encroached on the rights of the Crown or the nation.

The Queen’s prerogative consists, as Dr. Bowyer very well knows, not in making bishops, but in being sole head of Spirituality and Temporality in and over the Church. And it is in setting up in England a spiritual, and indirectly a temporal, power on the part of a Church which arrogates to itself pre-eminence over all others that the attempt consists to usurp and to encroach on the supremacy and rights of the crown and the nation; and which remain—and long may they continue to be—part and parcel of the law and constitution of this realm.

“These, and other arguments,” proceeds Dr. Bowyer, “urged in the Cardinal Wiseman’s appeal and in my pamphlet, remain to this day absolutely unrefuted. No attempt has been made to meet them on the merits; though the country is inundated with pamphlets, lectures, sermons, speeches, charges, addresses, episcopal answers to addresses, and newspaper articles on the ‘Papal Aggression.’ The only reply of our opponents has been a loud, vehement and frequent reiteration of their former positions, as though no defence whatever had been made on our side. The topics and assertions at the last public meeting are the same as at the first. Day by day we repeatedly hear indignant and bitter denunciations of the Holy See, as having ‘parcelled out the kingdom, violated the Queen’s prerogative as the sole fountain of honour, by the creation of dignities in England’—and outraged the sovereign power, by ‘erecting territorial titles.’ It would be

strange if all this had been done without any breach of the law! And yet, though a right honourable and learned person did give a loose opinion in a speech at a public meeting, and one or two lawyers have attempted to make out that our prelates are liable to premunire, or at least an indictment for misdemeanor (though that would not necessarily show the Hierarchy itself to be illegal), no one has been able, albeit, doubtless many were willing, to institute any legal proceeding—and the better opinion is, that no offence has been committed.

There is an old saying—"Do not holloa till you are out of the wood!"

"But nothing daunted—men boldly assert that the Queen's prerogative has been outraged; though they know or should know, that an offence against the prerogative must be a breach of the law, and they cannot show that the law has been broken. Never were watchwords and cries so powerful. The very words *Papal aggression* are—to the minds of many—an unanswerable reply to whole arguments and most learned authorities. A man who in his daily walks has seen the walls and the very pavement that he treads, chalked with *No Popery*, or still more energetic expressions of anti-papal zeal, and every newspaper full of invectives and threats of vengeance against Rome and the Cardinal Archbishop, soon brings his mind to consider himself personally aggrieved by the Pope, and shuts his ears against any attempt to justify what he believes to be a most wicked attack on his rights and interests, both in this world and in the next."

It is unusual that the somewhat phlegmatic mind of the people should have been so intensely excited as it certainly has been; and nothing but the hated memory of what Rome was in her former days of power, and the actual danger of this new attempt to restore it, could have aroused so much deeply-seated feeling. The excitement is indeed a strong proof of the aggravation. Englishmen are not thus moved by small matters. At the same time there have been many violences of expression which we condemn and lament. *Non tali auxilio tempus eget.*

"That instrument (the Papal Letter) has been stigmatized as insolent and arrogant. We have been told that 'there is an assumption of power in all the documents which have come from Rome' (meaning the Pontifical letter and the Pastoral)—'a pretension to supremacy over the realm of England, and a claim to sole and undivided sway, which is inconsistent with the Queen's supremacy, with the rights of our bishops and clergy, and with the spiritual independence of the nation, as asserted even in Roman Catholic times.'

"Let us examine these charges. I admit an assumption of power. But that power is essentially simply spiritual. It is part of the spiritual authority which the Pope exercises in these realms,—His Holiness being the person to regulate the affairs of our Church here, as well as elsewhere; and this is not inconsistent with even the Pro-

testant oath of supremacy—as Lord John Russell held in the House of Commons, on the 12th of August, 1846. The power exercised by the Pope, is simply that of providing in a regular way [nevertheless a *new* way since the Reformation in this country] for the cure of souls in his own Church, whereof he is the supreme pastor on earth. With regard to the alleged claim to sole and undivided sway, —I deny that there is one word in the Papal instrument, importing a claim to temporal power.”

It would have been an act of strangely suicidal folly if there had. It has been ever the characteristic strength of Rome to obtain temporal by means of spiritual power. Mr. Cobden fell into a forgetfulness of this same fact when he harangued the Manchester soir  e the other evening, and assured his audience that there was nothing to fear from the Pope, for his whole fleet consisted of two brigs, a schooner, and a steamer or two. We have it in memory, nevertheless, that tolerably large temporalities were obtained by Rome among us by means quite as purely spiritual in their inception as this Papal Letter, and temporal power to boot of no ordinary magnitude: and “burnt children dread the fire!” Dr. Bowyer continues, and does not see how the exercise of

“Spiritual authority by the Pope can be inconsistent, whatever may be its form, with the Queen’s spiritual supremacy and the rights of the Established Church, except in this theological sense, (in which neither the one nor the other can be acknowledged by Roman Catholics,) that the Roman Church claims to be *the Catholic Church*, and therefore takes no notice of other communities professing to be the true Church in particular places, such as the Established Church in this country. The Roman Catholic Church cannot make any reservation or admission of the rights of the Anglican Church without acknowledging herself to be a false pretender to the character of the Universal and only true Church. I defy the most astute casuist or pleader to draw an instrument containing an admission, tacit or express, such as would satisfy Protestants, and at the same time not involving an abandonment of the rights of the Roman Church as *THE Catholic Church*.

How perfectly does this bear out our assertion of the essentially intolerant character of the Roman faith! It is a remarkable admission.

“That it is not merely a Church, but the Church, is an essential part of our religious system, which if we be tolerated at all we must be permitted to hold, and that doctrine was well known to those who passed the Catholic relief acts. The Papal letter, therefore, necessarily ignored the Established Anglican Church—making no allusion to it. There is nothing new in this, for it is an inevitable consequence of the relative positions of the Roman See and the Anglican communion ever since the reign of Henry VIII. And so no Roman



Catholic can admit theologically the ecclesiastical supremacy of the Crown, though he may do so legally and politically, considering it as an institution created by municipal law and appertaining and confined to the Church by law established. Therefore the Roman Catholic oath is framed by the legislature, so as to imply a recognition of the Papal supremacy as contradistinguished from the Royal supremacy, for the same person cannot submit himself to both together; and the Pontifical letter makes no allusion to or admission of the Regal supremacy, for the same reason that it makes none to the Anglican Church."

The oath, on the contrary, is framed so as to pledge the Roman Catholic to admit the ecclesiastical rights of the Church and Crown so far as swearing not to disturb or weaken the Protestant religion, and therefore whatever ministers to that religion; and Liguori has shown with how little effect such a pledge is imposed.<sup>1</sup>

It is a mistake, moreover, of Dr. Bowyer's that the oath "implies a recognition of the Papal supremacy" because it says nothing about it. This is about the boldest deduction modern logic has yet furnished.

"I proceed now to the alleged inconsistency of the instrument with the spiritual independence of the nation as asserted even in Roman Catholic times. It is necessary to observe that in those times the Roman Catholic Church was the Church of the State—the Church by law established—and that certain legal relations existed between the Pope, as supreme pastor thereof, and the State. But the laws regulating those relations, such as the statutes of Provisors and Præmunire, can no longer be applicable, now that the Roman Catholic Church is reduced to the legal condition of a dissenting body having no connection with the State, and whose internal arrangements have no existence in the eye of the public law of the realm, and affect no legal rights of a public nature.

"This distinction affords an answer to the learned and ingenious argument of Mr. Barnes in his pamphlet on the Papal Brief. In fact, the Anglican Church professes, and is held by the law of the land to be the very same Church which was founded by St. Augustine. Now, to the rights and property of that Church, and to those of no other, can the laws in question be applicable in the eye of the Constitution. The statutes of Provisors and Præmunire regard rights of presentation to benefices, and the appointments to abbeys and bishoprics in *the Established Church*, and were intended to restrain the see of Rome from defeating the temporal rights of patrons and bodies corporate, recognised as part of the Common Law. But the law now regards the Catholic Church in England not as the Church of England, but as a dissenting body having no legal succession, or benefices or dignities whatever. So the stat. 27 Edw. 3, c. 1,

<sup>1</sup> "It is lawful to confirm equivocation with an oath."



is against the prosecuting suits in a foreign realm, or in any other court, *to impeach the judgment in the King's court*. It is intended to restrain the ecclesiastical courts and appeals from them to Rome. And the proceedings against Cardinal Wolsey on the Stat. of Præmunire, 16 Ric. II., were for encroaching on the King's courts by his jurisdiction as Legate *a latere*, 'to the deprivation of the King's power established in his courts of justice.' The Legate exercised jurisdiction over the Church by law established and its temporal legal rights, having an appellate jurisdiction from its ecclesiastical courts enforced by legal process. This case alone suffices to show the inapplicability of the statutes and authorities before the Reformation to any arrangement of the Roman Catholic Church in our times, which the Constitution does not allow to have any connection with the Church for whom those statutes were made, nor to be any thing more than a dissenting body, only recognised as such by the law.

Thus, when the Roman Church is pleased to assert its authority, it is the only true Church, and all others are heretical, and to be at least ignored, if not summarily put down; but when the Church of Rome is somewhat in alarm of ugly-looking pains and penalties in the statute book, it is presented as a mere dissenting denomination quite beneath the eye of the law, and against which no laws can be applied which its rampant state evoked. This, though true in fact, is vastly convenient.

Mr. Barnes thinks the 16 Ric. II. does apply to the present Papal measures. Mr. Warren thinks otherwise. Now the 13th of Eliz. makes it very immaterial whether it does or not. We cannot, however, agree with Dr. Bowyer as to his construction of that statute and of the penalty of præmunire, but at any rate concur with Mr. Warren that "it could never now be effectively brought to bear." The offences were, according to the statute, things "clearly in derogation of the king's crown and of his regalty." The provisions also imposing the penalty comprise all who purchase or procure in the Court of Rome "any bulls, instruments, or other things whatsoever which touch the king, against him, his crown, his regalty, or his realm, as is aforesaid, and also all who bring them within the realm, or make thereof notification or other execution whatsoever." Dr. Bowyer's complete answer to the applicability of it to the present case is an exact argument for it. He says, "Oh, but those penalties were levelled at practices against the king by the Pope when the Papal faith was the established Church in England." Does he really think that they are less penal when she is no longer the established Church? and that acts of disloyalty against the crown are to have immunity when practised by Dissenters, which were severely punished in Churchmen?

Lalor's case, which took place on indictment under this sta-

tute, is worth notice, inasmuch as it shows the statute to have been enforced long after the Reformation. Dr. Bowyer passes it in silence, whilst he comments only on Wolsey's case. Lalor was indicted upon 16 Ric. II. c. 5, for exercising in Ireland, in 1607, the authority conferred upon him by the Pope's bull or brief, of Vicar-General or Vicar-Apostolic within the diocese of Dublin, Kildare and Ferns. His objection to the indictment was, that what he did was only *in foro conscientiae*, and not *in foro judicii*: the objection was overruled, he was convicted, and received judgment in the terms of the statute.

This is part and parcel of Dr. Bowyer's argument, which he seems to have almost borrowed from Lalor. But Sir James Ley, C. J., told Lalor, "that though it were manifest that he exercised jurisdiction *in foro judicii*, for every institution is a judgment, and so is every sentence of divorce, yet were his offence nothing diminished, if he had executed his office of Vicar-General *in foro conscientiae tantum*, for the court of man's conscience is the highest tribunal, and wherein the power of the Keys is exercised in the highest degree." So much for the attempted distinction between temporal and spiritual jurisdiction. The latter is simply the stepping-stone to the former, and infinitely more pernicious when misused. Dr. Bowyer proceeds thus:—

"I am willing to make all allowances for the misconceptions arising from a want of the technical knowledge and legal accuracy requisite to comprehend the spirit and tenor of the late Letters Apostolic: and for the removal of such errors, the full and correct version of that instrument is set forth below, followed by explanations showing how entirely groundless are the various charges of aggression, usurpation and encroachment of which we have heard so much during the last two months."

"This shows manifestly that (although the Holy See could have first abolished the Vicars Apostolic and their vicariates, and then erected a new Church) the intention was to change the form of administration of the Roman Catholic Church in England—substituting an ordinary for an extraordinary ecclesiastical administration—by placing Diocesan Bishops in the stead of the Vicars Apostolic; but not to create a new Church, standing in a different relation to the State and its institutions, from that in which the community administered by the Vicars Apostolic hitherto stood. And accordingly the *pars conclusoria*, or operative part of the instrument, decrees that in the kingdom of England, according to the common rules of the Church, there shall be restored the hierarchy of ordinary bishops, who shall be named from sees which are constituted by the Apostolical Letters in the several districts or Apostolic vicariates.

"Here we see the futility of the charge of parcelling out the kingdom, for the dioceses are, in point of fact, constituted in the districts

already existing—which shows that the arrangement is internal—or within the Catholic Church. \* \* \* \* \* Though counties are necessarily mentioned to define boundaries where the districts are divided, still the whole arrangement of the dioceses is founded on and refers to the already constituted districts, which no one has ever suggested to be illegal or liable to objection, and which the name of diocese cannot render so. Thus the Pope did not ‘parcel out the kingdom,’ but merely subdivided some of the districts *constituted by himself* in 1840, and called others, and the new districts so formed by those subdivisions, by the name of dioceses. In this sense must be understood the passage which states that in the illustrious kingdom of England there will be established one ecclesiastical province, consisting of one archbishop and twelve bishops his suffragans. The word province is clearly used in a mere ecclesiastical sense, as signifying the limits of an archbishop’s spiritual jurisdiction, and the twelve bishops and their dioceses are constituted in lieu and by alteration of the Vicars Apostolic and their districts. And the Pope reserves to himself power to divide again the province and dioceses thus constituted.”

If we rightly comprehend this, it means that the Pope has not parcelled out the kingdom in 1850 because he had already done it in 1840. The districts “were then constituted by himself,” says Dr. Bowyer, and we willingly accord him the entire benefit of the distinction. But province, we are told, is used only in an ecclesiastical sense in the Bull. At any rate it means the territory in which each ecclesiastical ruler is to rule ecclesiastically: in other words, a territorial division of England for the ecclesiastical government of the Pope, or papal Bishops therein! A sort of “domestic policy,” which we humbly beg to decline submitting to quite as quietly as Dr. Bowyer suggests. The other argument seems equally unhappy, namely, that because nobody objected to the first abuse of districts for Vicars Apostolic, no one may now complain of Bishops for sees. Because the thin edge of the wedge was inserted without observation or comment, we are to have it driven home without a murmur!

“I am far from saying that the late Papal measure is unimportant to our own community. On the contrary, I believe it to be pregnant with lasting and inestimable benefits, both spiritual and administrative, to our Church; and calculated to promote the cause of religion in a most important manner. But for that very reason we have a right to receive and enjoy it, and we claim that right in the name of toleration and justice; and whatever the change may be to us, it has no reference or relation to others,—for (as Cardinal Wiseman neatly and forcibly said in his first lecture on the Hierarchy), ‘Observe that the question is not that Catholics up till now had no Bishops, and have for the first time introduced them. Had this been the case,

one might have imagined that the Church which till then had been the only episcopal one in the island, might have considered that there was some invasion of its rights by the introduction of a new corporate body of Bishops, distinct from and independent of itself. But this is not the case. The question is not one of the appointment of new Bishops: it is one simply of the change of their titles. Those who before were called Vicars Apostolic are now ordinary Bishops, and what was before called a district is now called a diocese."

Unfortunately "lasting and inestimable benefits" to their faith are equally lasting and immeasurable injuries to ours: and it does *not*, therefore, when we are dealing with an aggressive foe, in the least follow that "for that reason they have a right to receive and enjoy" those benefits. No one has any right to that which he uses hostilely against others. Toleration forbids instead of supporting such a claim.

We are therefore quite prepared to answer the following question in the affirmative, for England and all other essentially Protestant countries.

"It is unnecessary here to allude to the acts whereby the rank and offices of the Irish Catholic Prelates have been sanctioned by the Government and by Parliament. Independently even of those acts of recognition, the question is this: *Is Parliament prepared to say that the Roman Catholic subjects of the Queen in the entire United Kingdom shall have no Bishops in ordinary?* Nay, the question applies also to the Colonies. Is it possible that Parliament will interfere directly with the spiritual discipline of the Roman Catholic community, and say that in no part of the empire, or even that in no part of the United Kingdom, they shall enjoy that form of spiritual administration which their Church holds most important and salutary for the interests of religion, and only to be dispensed with in cases of necessity? This would, indeed, be reducing toleration within the narrowest limits, and abandoning a system of fair and impartial domestic policy, without which the government of Ireland must be next to impossible, and that even of England subject to perpetual religious dissensions and heartburnings. Yet this is, in truth, what has been asked by the petitioners, against what they style Papal Aggression, though, doubtless, many among them did not clearly see the true nature of their own requests!

"I have not overstated the case by asking whether we are to be precluded entirely from having bishops in ordinary,—for our new bishoprics are created, in deference to the temporal law,—with spiritual titles, not claimed by any prelate of the Establishment. Yet it is contended, that even this is not to be permitted, and we are told that the Roman Catholic Bishops must have no dioceses at all, nor be styled Bishops of any place where they exercise spiritual jurisdiction. And we must be content with titular Bishops of Sees in *partibus infidelium*—Bishops of Melipotamus or Trachis,—that

Protestant controversialists may continue to taunt us with being no Church, but mere missionary congregations, governed by foreign prelates, and without any regular Episcopate! To call this toleration is indeed a strange perversion of the word. And such a restriction is manifestly inconsistent with the Emancipation Act, which, by clear implication, allows our prelates to take any spiritual titles not appropriated by law to the Established Church, and with the oath prescribed by that Statute, whereby the spiritual jurisdiction of the Pope over the Roman Catholic subjects of the Crown, in the exercise of which he has created the new Hierarchy, is admitted by equally clear implication of law."

This is about the fifth time that Dr. Bowyer urges this strange fallacy. Is it possible that he can seriously think that not to require a man to abjure a doctrine is to affirm or to admit its justice! There is no implication whatever in the case; and what we at first thought a somewhat ingenious argument, on further thought is one of the lamest non sequiturs we ever saw in print.

We are entirely obdurate to the above appeal to our benevolent sympathies about the cruelty of depriving our Roman Catholic brethren of the benefits of Bishops. They have done remarkably well without them for 300 years: and have thriven, but far too well of late, and may very well be denied this extra claw, without any kind of inhumanity.

Here is pretty plain avowal of the intent to proselytise aggressively against Protestantism:—

"And as the Pastoral is addressed only to Roman Catholics, so it does not contain one word asserting jurisdiction over Protestants, *though of course it is the duty of the Cardinal to convert them, if possible, to the faith of his Church*, and so bring them within the actual pale of his spiritual authority; for he must hold that it is the only true Church, to which all mankind ought to conform and submit. But in this respect the institution of the hierarchy has introduced no new principle or doctrine [only new power]. \* \* \*

"And in like manner when the Cardinal says, in paragraph 7:—'Your beloved country has received a place among the fair Churches which normally constituted form the splendid aggregate of Catholic communion'—his Eminence must be understood as speaking not of the whole nation, for that would be contrary to fact, but of the English Catholic Church—that is to say, the country, so far as it is Catholic. Consequently he goes on to say: 'Catholic England is restored to its orbit,' &c., meaning that the Catholic Church of this nation, which the law calls the Roman Catholic Church, in England is so restored. The words 'Catholic England' no more mean to assert that all England is Catholic, than the expression, the scientific world, signifies that the whole world is scientific.

"The meaning of these phrases is, that the Catholic, or, which is

precisely the same thing, the Roman Catholic Church in England, has been for centuries deprived of its hierarchy,—and that hierarchy is now restored,—whereby ‘Catholic England is restored to its orbit,’ &c.

That is to say, when the Cardinal, who understands the English language as well as most of us, says to us, “your beloved country,” he means “the Roman Catholic Church in England,” or “Catholic England.” If so, words may mean anything for the future which it may be found expedient to say they mean. We shall, however, continue to believe that Cardinal Wiseman said what he meant, and meant what he said; and so may Dr. Bowyer assure himself will every single individual who reads it, whatever he may think of the policy of such statement.

And yet Dr. Bowyer calmly, and we doubt not with perfect sincerity, says in conclusion:—

“In these comments on the Letters Apostolic, and the Pastoral, I have ‘explained away’ nothing. I have only shown the true nature and intent of the instruments, and the real meaning that they convey. And this is the more necessary, because Protestants have been hitherto in the habit of utterly neglecting the acts of our Church, and therefore, the forms and expressions used in those acts, now that they are made unusually public, seem strange, and give rise to misunderstanding and offence. I have done this according to common sense, without subtlety or refinement, addressing myself to the plain reason of the country.”

He adds,—

“Another class of persons we cannot hope to convince; I mean those who wish to obtain by the cry of Papal aggression the assistance of the Civil Power, to maintain a difficult theological position, in which they find themselves. I say this, meaning nothing disrespectful or uncharitable, for it is perfectly natural, though not, in my opinion, right or fair, that they should call on the State to impede and discourage a formidable controversial adversary of what they believe to be the truth.”

“‘We derive from you our hierarchy, and if we possess any Holy Orders, they also are from you; but you must be content to remain without a hierarchy here, and governed by bishops of foreign sees,—because your hierarchy resembles ours, and therefore is an aggression against us, though you claim no participation of our legal privileges.’”

We have now allowed Dr. Bowyer, for his new allies, to expound their grievances in our pages very fully.

We are obliged to Dr. Bowyer for the compliment he intends to pay us by assigning a Roman ancestry to our bishops. We



are bound to decline the honour. *We owe them exclusively to the Reformation!*

Very much akin to the Cardinal's kind intentions towards the restoration of our "beloved country" to the "Catholic communion," and very unlike an exclusive desire for spiritual jurisdiction is this language in his Pastoral: "At present, and till such time as *the Holy See shall think fit* otherwise to provide, *we govern*, and shall *continue to govern* the counties of Middlesex, Hertford and Essex, as ordinary thereof." Justly does Dr. Cumming say on this:

"If he had been wanting spiritual jurisdiction only, he would have said this—'We *teach* and shall continue to *teach* Roman Catholics in the counties of Middlesex, Hertford and Essex;' but he is not satisfied with that, and he says, '*we govern*;' not '*we teach persons*,' but '*we govern places*'—not as long as the queen likes, but as long as the Pope permits."

Indeed, throughout the Documents, the assumption of unqualified jurisdiction appears in the plainest manner. "We decree," the Pope says, "to be null and void, whatever may happen to be attempted by any one against these things, on whatever authority, knowingly or ignorantly." Here is a defiance of the Parliament, and the Throne! The Prime Minister has given an intimation that the challenge will be taken up. We are without doubt it will. The tone of the Premier's letter to the Bishop of Durham assures us that this attack on the Constitution will be repelled with equal vigour and determination by that great Statesman; than whom no one better understands its inestimable value, and the importance of maintaining inviolate its *highest element*.

The really Protestant Church and people of England, have "no difficult theological position to maintain," but simply the purity of an evangelical faith to defend alike from foes without, and the still more perilous treachery of apostates within: who alone *are* placed in the theological difficulty described. We do not ask for State aid to enable us to grapple with a "controversial adversary," who, if fair controversy were alone employed as a weapon, might be safely allowed to fall by the fallacy of his doctrines and the weakness of his arguments; but with a systematised and reinforced confederacy of deceivers, openly avowing equivocation and falsehood<sup>1</sup> as their instru-

<sup>1</sup> Vide Alphonso Liguori, that "theological writer of heroic virtues," (as Cardinal Wiseman affirms,) "His positio, certum est, et commune apud omnes, quod ex justâ causâ licitum sit UTI ÆQUIVOCATIONE, modis expositis, et cum JURAMENTO FIRMARE." Vol. II., Book iv. tr. 2, p. 316.



ments, and announcing the exercise of powers of proselytism thus armed against the unwary and ignorant of our own communion. Neither do we ask for new laws to avert these new evils. Those enactments which the Protestant Parliaments of our realm have already furnished, independently of those statutes which the uniform policy and wisdom of the legislature, from the Richards to Elizabeth, have often placed and maintained in the Statute Book, *even in the days of Queen Mary*, amply suffice for the purpose.<sup>1</sup> In this case we may, perhaps, be permitted to say "*Nolumus leges Angliæ mutari*," without the imputation of being deaf to reason, and bent on obtaining the civil power to put down a controversial adversary! Enough has been said to divest the charge of any foundation. The civil power exists; and we seek no more but less than the law affords us, of the protection due to our own faith and evangelical truth.

The only point on which we feel that some injustice has been done to the Papal party in this matter is the charge of its being an insidious movement. Lord John Russell clearly meant this term to apply to its initiative in this country by the traitors within our own Church, who, with the pay of a Protestant Establishment in their pockets, and Rome in their hearts, have been espousing her doctrines, imitating her forms, and inviting her aggression. This charge certainly does not apply to the Papal party: and the following fact, which has been communicated to us on high authority, absolves them wholly from it.

*Before the Papal letter left Rome the Pope, at an interview with Lord Minto, held out to him a paper and said, "Here, Lord Minto, is something for you. This is a document, containing the appointment of a Catholic Hierarchy for England and Wales." Lord Minto thereupon smiled, bowed, and neither read the document or made any comment.*

This was clearly a notification to Lord Minto, our representative at Rome, of the projected measure: though, on the other hand, the diplomatic silence of his lordship can be interpreted no otherwise than as *an avoidance of any opinion*, and of any act from which an opinion could be legitimately inferred. Neither can the inference be warranted, that the government at home were apprised sufficiently early to have protested against the issuing of the Papal letter, even if they had deemed it right to do so.

The remedy already most applicable to the case appears to us

<sup>1</sup> The Pope was permitted to do certain things within this realm *by usurpation, and not of right*, until the reign of Henry VIII.—*Lord Coke.*

to be the statute of the 13th of Eliz. c. 2, s. 3.<sup>1</sup> It defines the precise offence committed by those who have obtained or used, or printed or published, the papal letter. And though it is obvious that the offence is high treason, the punishment is in the hands of the crown, and that the royal discretion would be exercised with abundant mercy, there can be no question.

It is objected to further legislative prohibitions that if English Papal Bishops be declared illegal, so must the Irish and Colonial Papal Bishops. The simple and conclusive answer of the government to this will probably be, with reference to the *latter*, ‘Rightly or wrongly, in hæc fœdera *veni*,’—to the former, ‘*non veni*.’ There must be some limit to concessions.

If it be thought (as many do think) that it were wiser to enact fresh penalties, that course is clearly open to the government, and would meet with general response by the people. In no case will it, however, be sufficient *alone* to amend the phraseology of the statute of Geo. IV., so as to exclude the assumption of the mere *name* of bishop. It is *now* very immaterial by what title they are called. As vicars apostolic they will *now* have nearly the same episcopal prestige and power. THE SENDING OR USING HERE OF FRESH BULLS OR INSTRUMENTS FROM ROME GIVING FRESH POWERS MUST CONTINUE TO BE A TREASONABLE OFFENCE in all the length and breadth of the act of Queen Elizabeth, made when they understood how to draw statutes as they ought to be drawn, but with greatly mitigated penalties. Nothing less will meet the emergency, or abate the peril; nothing less will fulfil the sacred claims of religious liberty, and nothing less will content the expectations of the people against a measure so well denounced by the first minister of the crown as “A pretension by a foreign potentate to SUPREMACY OVER THE REALM OF ENGLAND! A CLAIM TO SOLE AND UNDIVIDED SWAY, INCONSISTENT WITH THE QUEEN’S SUPREMACY, WITH THE RIGHTS OF OUR BISHOPS AND CLERGY, AND WITH THE SPIRITUAL INDEPENDENCE OF THE NATION!”

<sup>1</sup> We have said nothing about the 1 Eliz. c. 1, because it was clearly applied to the redress of a personal grievance touching the sovereign, and, however applicable in law, would not be so in fact. It is, however, not wanted, inasmuch as the later general statute more than suffices.

## Notes of Leading Cases.

### *EQUITY.*

#### COPYRIGHT IN AN ALIEN—RESIDENCE IN ENGLAND—INJUNCTION WHEN TITLE DOUBTFUL.

*Ollendorff v. Black*, 14 Jur. 1080.

THERE are conflicting decisions at common law as to the right of a foreigner to support a title to copyright in this country. The case of *Cocks v. Purday* (5 C. B. 860), which we noticed amongst our leading cases in vol. ix., p. 239, distinctly lays down, without any restriction as to domicile, that a foreigner who is the author of a work which he has first published in England, and which has not been made publici juris by a previous publication elsewhere, has a copyright in that work in this country.

On the other hand, the Court of Exchequer, in the more recent case of *Boosey v. Purday* (4 Exch. 145), has decided, that a foreigner residing abroad at the time of the first publication of his work in this country has no copyright in it here. The point has since come before a court of equity in *Ollendorff v. Black*, the case at the head of this note. The plaintiff, Dr. Ollendorff, who was an alien living abroad, having composed a work, published the same for the first time in this country. At the time of its publication, and for some time previously, he resided in this country, but it did not appear that he had lost his foreign domicile, or that his residence here had been otherwise than temporarily. A pirated edition of his work having been imported into this country from abroad, Dr. Ollendorff filed a bill for an injunction to restrain the selling of such edition. On motion for such injunction the question was, whether the plaintiff, being an alien, could assert a title to copyright in this country.

Vice-Chancellor Knight Bruce granted the injunction, but without overruling *Boosey v. Purday*. In that case the author was an alien who had never been in this country during the first publication of his work, but in *Ollendorff v. Black* the

plaintiff was himself in England when the publication took place there. This was considered by his Honor to be a material circumstance distinguishing the case from the case of *Boosey v. Purday*, and which was sufficient to justify the course his Honor took, assuming even *Boosey v. Purday* to be law. It is evident, however, from what fell from the Vice-Chancellor, that his Honor disapproved of the decision of the Court of Exchequer in that case; and that he thought the decision in *Cocks v. Purday* to be the more correct view of the law. It is difficult to understand how the distinction can make a substantial difference; for if a foreigner domiciled abroad, but residing here during the short time his work is publishing, is to have a copyright in the work in this country, it cannot be sound law to hold that he shall not have such protection, if, instead of coming himself over to England, he transmits the work to an assignee in this country in order to be published here. It was argued in *Ollendorff v. Black* by counsel for the defendant, that at all events the legal right of the plaintiff to the copyright was so doubtful from the conflict of decisions at law, that the court would not interfere by injunction until the question of the plaintiff's legal title had been established in an action. The Vice-Chancellor, however, expressly dissented from the proposition that that was a sufficient reason for withholding the injunction, considering that the court has a discretion in every case, and that it is not bound by any rule to refuse an injunction merely because some doubt might be cast on the plaintiff's legal title. On this point the opinion of the Vice-Chancellor, which is important for the rule it establishes, was expressed as follows: "It has been said here that the legal right is doubtful, that the mere existence of the doubt is sufficient to prevent the court from granting the injunction. In that I do not agree. I believe that doctrine to be new in this court; for it would interfere theoretically and practically with its jurisdiction, daily exercised to a very great extent. The question of the legal right being in doubt is a matter for the serious attention of the court, and one to which it is right that weight should be given; but it is not a matter which renders it incumbent on the court to refuse the injunction. The court must be guided by a discretion exercised according to the exigencies and the nature of each particular case."

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**COMMON LAW.****COUNTY COURT—ORDER TO PAY BY INSTALMENTS EMBODYING ORDER FOR COMMITMENT.**

*Abley v. Dale*, 14 Jur. 1069.

THE cases of *Ex parte Kinning*, 4 C. B. 513, and *Kinning v. Buchanan*, 18 L. J., C. P. 332, have established what is now well known, that an order made by a judge of a County Court, under the County Court Act, for the payment of a debt by instalments, cannot in case of default be enforced by committal to prison, without the debtor being first summoned before the judge to explain why he had not paid the same. The principle on which those cases were decided was, that a man is not to be punished without an opportunity of defending himself. That principle was further recognised and affirmed in the case at the head of this note, in which it was held, that if a judge of a County Court make an order on a defendant to pay a debt by instalments, and the defendant make default, the latter has a right to be heard in his defence before he is committed; and the order of commitment upon nonpayment cannot be embodied in an order to pay by instalments. The facts of this case differed from those in *Ex parte Kinning* and *Kinning v. Buchanan*, inasmuch as in the present case the debtor had been summoned on the first default, and a second order had been made for the payment of the debt; but the principle to which we have alluded as governing those cases equally applied to the present one.

The action was trespass for false imprisonment, and the defendant pleaded as a justification that he had recovered against the plaintiff in a County Court a judgment for debt and costs payable by monthly instalments, and that the plaintiff had paid thereunder a certain portion of the amount, but had made default in payment of the residue; that the plaintiff was then summoned to answer concerning his estate and effects, and that he appeared and was examined by the judge, who adjudged that the plaintiff had sufficient means of discharging the debt, &c., and ordered him to pay it by certain other instalments, or that he should be committed to prison. The plea then stated a default in such last instalments, upon which a warrant was issued out of the court for the plaintiff's committal, under which the defendant justified. On demurrer to this plea it was attempted by counsel for the defendant to distinguish the case from the cases of *Ex parte Kinning* and *Kinning v. Buchanan*, on the ground that the plaintiff had, in the present case, been sum-

moned and heard under the 98th section of 9 & 10 Vict. c. 95, and that it was not the intention of the legislature that he should be again summoned; but the court held, that those cases were not distinguishable in principle from the present one, and gave their judgment for the plaintiff on the broad and general principle that, in the case of a penal commitment, the party to be punished is entitled to be first heard in his defence; and that as the provisions of the act were not clearly inconsistent with this general rule of law and justice, the court would not infer that they were.

The result of this case is, that although the judge has power, after examination of the debtor under the 98th section, to commit such debtor forthwith, he has not power to make an order for committal to take effect at a future period, contingent on the event of the debtor not making such payments as may be ordered. "Before an order is made for his committal," said Maule, J., "ought he not to be summoned, and an opportunity given him to explain, if he can, why he has neglected to pay? No doubt, if he is ordered to pay forthwith, and he does not pay he may be committed forthwith; but the act does not say that the judge may order him to pay at the expiration of a given time, and if he does not pay then that he is to be imprisoned without further inquiry. It might be that, although the judge was perfectly satisfied and on good grounds, that the debtor would be able to pay at the end of six weeks, and made an order for him to pay then, yet that, when the day came, ample reason would be given to excuse the nonpayment, and induce the judge not to commit." The case of *Re the Hammersmith Rent-charge*, 4 Exch. 87, in which it was held that, under the Tithe Commutation Act, a judge might order a writ to issue to the sheriff upon an ex parte application, was distinguished from the present case upon the ground that that was civil process; but that here the imprisonment was the penalty, and which might be for forty days, or for less, according to the discretion of the court, and that consequently all the circumstances necessary for regulating such discretion ought to be before the court.

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#### RESTRAINT OF TRADE—CONSTRUCTION OF COVENANT.

*Elves v. Crofts*, 19 Law J. C. P.

It is now well established that a covenant is not void on account of its being in restraint of trade, if it be subject to a reasonable limitation, and that such limitation is to be ascer-

tained by reference to local space, and not to duration of time. In *Hitchcock v. Coker*, 6 Ad. & El. 440, which has since become the leading authority on the subject, and was a decision of the Exchequer Chamber, it was held that the restraint was not shown to be unreasonable by the circumstance that its duration was not limited to the life of the covenantee, or to the time during which he should carry on the business which the covenantor contracted not to be engaged in. The court there considered that the absence of such a limitation in the covenant was the only effectual mode of securing to the covenantee the full benefit of the goodwill of his trade.

But that case, as well as *Mallan v. May*, 11 M. & W. 651, which followed it, was not decided in opposition to, but confirmed the rule laid down by Tindal, C. J., in *Horner v. Graves*, 7 Bing. 743, that whatever restraint is larger than the necessary protection of the party, with whom the contract is made, is unreasonable and void, as being injurious to the interests of the public. Were it not for the difficulty, if not impossibility, of applying the restriction to time, as well as to distance, the question of reasonableness with regard to what is required for such necessary protection of the covenantee should, in justice to both parties, be affected by the time being limited or not. *Hitchcock v. Coker*, and the subsequent cases decide, however, that the covenant is not unreasonable, where there is no such restriction as to time. But the decision of that case was only as regards the reasonableness of the covenant when made, and it left untouched the question whether a covenant in restraint of trade, reasonable at the time it is entered into, according to the rules of law which have been laid down, may not by circumstances, afterwards arising, cease to be so reasonable, and become no longer binding.

In the case at the head of this note, the contention on the part of the covenantor was, that when the restriction had ceased to be necessary for the protection of the covenantee, or his assigns, the restriction was altogether gone and the covenant could no longer be enforced. The point arose on the validity, after verdict, of two pleas in an action for the breach of a covenant, by which the defendant, on his assignment of the goodwill of his trade of a butcher to the plaintiff, covenanted not at any time thereafter to exercise or carry on the trade of a butcher within five miles of the premises on which the trade had previously to such assignment been carried on, nor to do any thing to the prejudice of the trade of a butcher, to be thereafter carried on by the plaintiff there. The defendant pleaded that before breach the plaintiff wholly discontinued the business of



a butcher, and the same had not since been carried on at the said premises or elsewhere, either by the plaintiff or his assignee or licensee; and he also pleaded that before breach the term in the premises had expired by effluxion of time. On both these pleas the defendant obtained a verdict, and he contended that they were an answer to the action; the court, however, considered that the restriction had not ceased to operate, by reason of what was stated in those pleas, for that the covenant, upon the authority of the cases to which we have already referred, was valid and binding at the time it was made, and that it could not be varied by any subsequent occurrence; they therefore gave judgment for the plaintiff on these pleas, non obstante veredicto. The court said, that if considerations of time or degree were to be permitted to affect the right to enforce such a covenant, its value would be diminished, and the saleable quality of the goodwill would be injured.

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#### COUNTY COURT.—SERVICE OF JUDGMENT.

*Ely v. Moule*, 14 Jur. 1070.

IN this case the question was, whether the order of a judge of a County Court for the payment of a debt, required to be served before execution, could be issued on it.

The plaintiff had been summoned to answer a plaint in a County Court but failed to appear, and in his absence the cause was heard, and an order made by the judge for the payment of debt and costs forthwith. On the same day on which the order was made the bailiff went to the plaintiff's house and demanded payment; and on his refusing, levied execution on his goods, under a warrant of execution from the court. The plaintiff afterwards brought an action of trespass for the seizure of his goods under such execution, contending that it was premature, as he had not been previously served with the order of the County Court, so as to afford him a reasonable opportunity of complying with it.

The court held that there was no necessity to serve the order, as the order was a judgment of the court and not in the nature of a rule; and that, therefore, on the principle that suitors of a court are to take notice of judgments given there without any notice served upon them, if the party on whom the order was made did not comply with its terms by paying within the time specified, the County Court was authorized to issue execution at

once. The court said that it mattered not that the party was not personally present at the hearing, as by the 80th section of the statute, if he neglected to attend after having been summoned, the judge was enabled to proceed in his absence as if he were actually present, so that the judgment was given in the constructive presence of such party.

Much reliance was placed by the counsel for the plaintiff on the 14th rule, which had been framed by the judges of the superior courts, pursuant to the 78th section of the statute, empowering them to make "general rules for regulating the practice and proceedings of the County Courts." The 14th rule directs that certain rules as to the mode of service of summonses to appear to a plaint "shall apply to the service of all summonses, *judgments*, orders, &c.;" and it was argued that the judges had therefore supposed cases in which judgments were to be served. In answer to this the court said that the rules were not a judicial exposition by the judges of the statute, and were not therefore binding on them as if they had been pronounced in cases in open court after argument; and also that they considered that the including "*judgments*" in the 14th rule was done for greater caution, in order that if there should be a case in which service of a judgment should be required, a direction was given in what way it was to be served, but that the judges never meant by the rule to decide that judgments were to be served. The statute certainly does not contemplate the service of any judgment, for, as was said by Platt, B., although Schedule D. provides for fees to the bailiff for serving the different processes of the court, it says nothing of fees for serving a judgment; nor is it easy to imagine any case in which the 14th rule can apply to judgments. Baron Parke says, "I have looked in vain through the statute for a case where service is required of a judgment;" but he suggested that the judges might have considered some such a case as where a judge of the County Court might order payment to be made within a certain time after service of the judgment; and Alderson, B., intimated that it might be contended that if an order were made to vary a judgment already given, it was an order and not a judgment.

The result of the decision, however, relieves the proceedings of the County Courts from the serious consequences which would otherwise have ensued had the plaintiff succeeded on the point he had raised.

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**CRIMINAL LAW.****SHOOTING AT A FELON.**

*Reg. v. Dadson*, 14 Jur. 1051.

THIS case, which has lately been before the Court of Criminal Appeal, is an important illustration of the rule laid down by the old authorities, that it is justifiable to slay or wound a felon when a felony has been committed, if the felon flies or resists and he cannot possibly be apprehended without so killing or wounding him. It is thus stated in 1 Hawkins, P. C., "If a person, having actually committed a felony, will not suffer himself to be arrested, but stand on his own defence, or fly, so that he cannot possibly be apprehended alive by those who pursue him, whether private persons or public officers, with or without a warrant from a magistrate, he may lawfully be slain by them."

In the present case it appeared that a constable employed to guard a copse from which wood had been stolen, saw a person come out from the copse carrying wood which he was stealing. The constable called to the man to stop but he ran away, and the constable having no other means of bringing him to justice fired and wounded the man in the leg. It was proved that this person was actually committing a felony, he having been before convicted repeatedly of stealing wood, but the constable did not know this and he was therefore found guilty. The Court of Criminal Appeal were of opinion that the constable had been properly convicted, as it was found that he was not aware that a felony had been committed at the time he fired at the man.

In this case the propriety of the conviction was held to depend on the knowledge of the constable that a felony had been committed. Had he known at the time he fired that such felony had been committed, he would probably have been justified in firing; but as he did not, his firing was not justifiable.

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## Short Notes of New Books.

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**The Leguleian; a Legal and Jurisprudential Magazine** (published monthly). Wednesday, January 1, 1851. London: published for the Leguleian Club by Wildy & Sons.

THIS new monthly publication derives its name from that of the Club under the auspices of which it is brought out; and it may be considered as the recognized organ of artied clerks, whose advancement it is eminently fitted to promote. The present number contains a selection of articles and notices on interesting subjects and useful points of law. The first article, which advocates a college for insuring the legal education of artied clerks, indicates an earnest desire for elevating their professional character, of which we cannot too highly approve. There is also a good comment on the law relating to the costs of trustee solicitors. The whole is got up in a very creditable manner, and we wish it every success.

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**The Royal Pardon Vindicated: a Review of Mr. Barber's Case.** By Sir George Stephen, Barrister-at-Law. London: Crockford, Essex Street.

THIS is an eloquent appeal in Mr. Barber's behalf, and will, we think, powerfully aid his restoration to the profession.

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**A Practical Guide to the Law of Bills of Exchange and Promissory Notes.** By Stewart Tournay, Esq., Solicitor. London: Groombridge and Sons, Paternoster Row. 1851.

A USEFUL book for non-professional men as far as the elements of the law on this branch are concerned.

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**Treatise on the Law and Practice of Naval Courts-Martial.** By William Hickman, R.N., late Secretary to Commodore Sir Charles Hotham, K.C.B. London: J. Murray, Albemarle Street. 1851.

A SENSIBLE and ample treatise, by a man fully competent to write it, on a subject which required the practical elucidation it has received at his hands.

**Upon Party.** By the Right. Hon. Edmund Burke and The Lord John Russell. Edited by Charles Purton Cooper, Esq. Second Edition. London: W. Pickering, Piccadilly. 1850.

A **VERY** excellent selection of definitions of Party, its character and uses, by eminent statesmen and orators.

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**The Magisterial Synopsis, comprising Summary Convictions and Indictable Offences, &c. &c. &c.** By George C. Oke, Author of the *Magisterial Formulist*. Third Edition, enlarged and improved. London: Butterworths. Dublin: Hodges and Smith.

WE are happy to see the Third Edition of this admirable work already out. A cursory inspection of the book amply warrants the author's assertion that "he has availed himself of the opportunity of improving the work in many respects in order to increase its utility, and that it may be somewhat worthy of the extraordinary favour with which it has been hitherto received by the Magistracy, their Clerks, and Professional Gentlemen."

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**An Index to the Reported Cases not overruled or obsolete, and to the Statutes, Rules and Orders relating to the Principles, Pleadings and Practice of the Courts of Equity in England and Ireland, and of the Equitable Jurisdiction of the House of Lords and Privy Council, from the earliest time down to the year 1850.** By John Jagoe, Esq., Barrister-at-Law. Vol. I. London: Butterworths; Stevens and Norton; Simpkin, Marshall & Co. Dublin: Hodges and Smith. 1851.

THIS is a work somewhat akin to Harrison's *Digest*, but more elaborate, and the evident pains taken by the compiler to exclude what is obsolete, and methodise and chronicle under ample indices for references what is still useful, entitle him to more than usual praise for the efficiency of his labours.

The Second Volume is not yet published. It will give the pleading and practice cases, and the rules, orders and statutes, including those of the last session of parliament, and the rules founded on them, with the tables of cases for both volumes, forming a complete *equity practice*—so that the first and second volumes are in themselves perfect, and will be very useful to equity practitioners.

The Third Volume also will contain the early decisions which relate to the principles of equity, and we shall again, therefore, have occasion to notice the merits of the work as a whole.

**Report of the Case of John W. Webster, indicted for the Murder of George Parkman. By George Bemes, Esq., one of the Counsel in the Case. Boston, U. S. : Charles C. Little and James Brown. 1850.**

**WE** must, when we have more space, again notice this phenomenon. Of all the leviathan machinery for breaking a fly this beats everything on record. A case divested of any kind of serious doubt or real difficulty, appears to have lasted twelve mortal days, and now fills (what with speeches and evidence) this huge volume of 628 pages!!! We undertake to give the entire gist of all that is really material in the evidence in two pages. The whole affair, as regards prolixity, is a negative example of all jurisprudence for all time to come; and we promise it as thorough a threshing and winnowing as we have yet bestowed on like offenders. It shall be belaboured along with our own precious law reporters.

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**Select Cases argued and adjudged in the High Court of Chancery before the late Lords Commissioners of the Great Seal and the late Lord Chancellor King, from the year 1724 to 1733. Second Edition. By Stewart Macnaghten, of the Middle Temple, Esq., Barrister-at-Law. London : V. and R. Stevens and G. S. Norton. 1850.**

**THESE** are the sort of reports we wish to encourage. This volume has been very judiciously selected from heaps of rubbish, a notice not only of old cases but of new ones, which are really useful to the profession. The notes are after the fashion of Smith's Leading Cases, and they are tersely and ably written.

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**On the Construction of Locks and Keys. By John Chubb. Assoc.-Inst. C. E. London : 1850.**

**A REALLY** interesting and graphic account of locks and keys.

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**Practical Remarks upon the Injurious Operation of the Wills Act, in respect to the Execution of Wills, with Suggestions for its Amendment. By an Advocate in Doctors Commons. London : William Benning & Co., Law Booksellers, 43, Fleet Street. 1850.**

**A VERY** ably written Treatise.

**The Act of Settlement and the Pope's Apostolic Letters. Second Edition. Pickering, London. 1851.**

**Ancient British and English Churches. Stillingfleet's Independence of the British Churches, &c.—Inett's Short View of the Ancient and Present State of the English Church and Monarchy. Pickering, London, 1851.**

**MR. Purton Cooper is the most indefatigable of extractors. Just what the public desires to find authority or data for, Mr. Cooper supplies them with piecemeal, at the very moment, and just as often as they seem to want it. Both of these are well-timed and palatable tit bits, and historical *bonne bouches* of admirable savour.**

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**Dart's Vendors and Purchasers. A Compendium of the Law and Practice of Vendors and Purchasers of Real Estate; comprising the Authorities down to the Present Time. By J. Henry Dart, Esq. Barrister at Law. London: Stevens and Norton. 1851.**

**WE have only glanced superficially at this work as yet; but, as far as we have been able to judge, it appears to us to warrant the high praise which we observe has been awarded to it by some of the daily papers.**

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## Events of the Quarter.

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**WE** deeply regret to have to record the alarming increase of arrears in the Court of Chancery. On the first day of Michaelmas Term the arrears of causes, appeals, appeal motions, and claims, amounted to nearly 800, and the arrears have now increased to 1,050, or upwards of 250 more than they were ten weeks ago. So that the arrears in this Court are increasing at the rate of nearly 1,300 per annum. There is also an immense mass of motions before the Vice-Chancellors, and a great number of appeal and original petitions for hearing. The office of Chancellor must be re-modelled as we have suggested, nor is there any time to be lost. The matter is urgent. Infinite mischief and boundless injury to suitors will be the result of further delay by the government.

**SINCE** our last number Mr. Baron Rolfe has been promoted to the Vice-Chancellorship of England, and has been elevated to the peerage by the title of Baron Cranworth.

**Mr. Martin, Q. C.,** of the Northern Circuit, has succeeded Baron Rolfe as a Baron of the Exchequer.

**THE** Common Law Commissioners have put forth their Report, consisting of moderate and, it seems to us at first sight, judicious amendments, but such as certainly will not satisfy many of the more radical reformers of our jurisprudential system. We must of course reserve a review of the Report till our next.

**DR. BOWYER** has resigned his office as Lecturer at the Middle Temple. We deeply regret his loss, as his contributions to law literature promised to be very valuable. The remuneration afforded is alone a discouragement to talent. John George Phillimore, Esq., has, however, accepted the office, and gave a most brilliant and learned opening lecture on the 20th ult., attended by several judges and men of legal eminence.

**LORD LANGDALE** retires from the Rolls, and will be succeeded by Sir J. Romilly, the Attorney General, to which office Sir A. Cockburn will be promoted. Mr. Watson or Mr. Page Wood, it is said, will be the new Solicitor General.

**WILLIAM MUSGROVE**, Esq., second puisne judge at the Cape, has succeeded **William Menzies**, Esq., first puisne judge deceased, and **Sidney Bell**, Esq., equity draughtsman, is, it is said, to succeed **Mr. Musgrove**.

**AN ADDRESS** has been sent by the Bar to Her Majesty, expressing the indignation and *surprise* it feels at the Papal Aggression, and an expression of its illegality and encroachment on the Queen's prerogative. Nothing could be more absurd than to assert "surprise" about a thing anticipated by every one as the natural result of the invitations to Rome by traitors in our own Church. It prevented many barristers, ourselves among the number, from signing the Memorial at all. It has appended to it the names of 747 gentlemen, consisting of 46 Queen's Counsel, 3 Masters in Chancery, 9 Serjeants-at-Law, and 689 outer barristers. A perusal of the names of those of the higher ranks of the profession will show that the feeling of deep offence at, and resolute determination to oppose, the Papal assumption, is confined to no political party. They are as follows:—

**QUEEN'S COUNSEL.**—**William Baker**, **William Selwyn**, **Sir F. Thesiger**, M.P., **Richard B. Crowder**, **Francis Whitmarsh**, **Christopher Temple**, **John Stuart**, M.P., **Clement T. Swanston**, **Robert P. Roupell**, **Sir John Romilly**, M.P., **George Chilton**, **W. H. Watson**, **K. Macauley**, **C. Knowles**, **L. C. Humfrey**, **John Greenwood**, **C. Hoggins**, **Richard Bethell**, **Sir J. A. F. Simkinson**, **J. G. Teed**, **Loftus Wigram**, M. P., **James Russell**, **Kenyon S. Parker**, **James Parker**, **John Rolt**, **Frederick Calvert**, **W. P. Wood**, M.P., **Richard Malins**, **C. H. Whitehurst**, **P. F. O'Malley**, **W. Whateley**, **Charles S. Greaves**, **James Bacon**, **Spencer H. Walpole**, M.P., **A. Hayward**, **George J. Turner**, M.P., **Edward J. Lloyd**, **John Herbert Koe**, **H. L. Shepherd**, **W. Loftus Lowndes**, **John Walker**, **Wilkinson Mathews**, **W. C. Rowe**, **Henry Keating**, **B. Peacock**, **George Butt**.

**MASTERS IN CHANCERY.**—**Sir W. Horne**, **Richard T. Kindersley**, **Richard Richards**.

**SERJEANTS-AT-LAW.**—**Alfred Dowling**, **Arnold Wallinger**, **R. C. Jones**, **N. R. Clarke**, **H. A. Merewether**, **H. Storks**, **J. B. Byles**, **W. F. Channell**, **E. S. Bain**.

**NEW ORDERS** were issued by the Court of Chancery on the 2nd November last, under the recent Acts, which we print elsewhere.

In twenty years hence it is to be hoped that such pitiable buffoonery as the following will have become matter of curious history—a sort of fossil relic of barbarism. **Mr. Baron Martin** is the victim. "Just before the rising of the Court on Thursday, the judges withdrew into their private room, where **Mr. Martin**, the newly-appointed judge, was invested with a coif. Immediately afterwards their lordships resumed their seats in court, and **Mr. Serjeant Martin** entered, and took his seat on the front bench, amongst the serjeants, and was then called upon to "count," according to ancient custom.

This ceremony, which is now much divested of its ancient solemnities, consisted simply (!) of the newly-made serjeant's reading a 'count' in an action of dower, as follows:—'Yorkshire to wit.—Ann Ring, widow, who was the wife of William Ring, Esq., by John Jones, her attorney, demands against Charles Davis the third part of ten messuages, ten barns, &c., in the parish of Ripon, in the county of York, as the dower of the said Ann Ring, of the endowment of William Ring, deceased, heretofore her husband, of which she has nothing, &c.' The senior serjeant in court, Mr. Serjeant Channell, then demanded that the writ of dower should be read, which was done by the officer of the court. Mr. Serjeant Byles, the next serjeant in point of seniority in court, then said, 'I imparle.' The Chief Justice said, 'Be it so.' His lordship then said, 'Brother Martin, will you move?' and upon Mr. Serjeant Martin bowing in the negative, the ceremony closed, and the court adjourned."

#### **CALLS TO THE BAR :—**

**MIDDLE TEMPLE, November 9th.**—William Caldwell Roscoe, John Hargrave Hodgson, George Edward Frere, Henry Lushington Phillips, and William Parker, Esquires.

**MIDDLE TEMPLE, November 30th.**—George Frederick Bullock, Alexander John Mansfield, Nathaniel Lindley, Thomas Turner, John Alexander Jackson, Wriothesley Baptist Noel, John Carter, Edwin John Herapath, William Sefton Moorhouse, John Doherty, and Horace M. Wright, Esquires; James B. Davidson, M.A.; Edward A. Carlyon, M.A.; and William U. Heygate, M.A.

**LINCOLN'S INN.**—Henry A. Roberts, John D. Rochfort, Esquires; Francis Compton, D.C.L.; William S. Pakenham, M.A.; Edward P. Walstenholme, M.A.; Francis Dobinson, M.A.; and Samuel Brandram, M.A.

**GRAY'S INN, November 20th.**—Montague Mordaunt Ainslie, Esq. (of Christ Church College, Oxford, B.A.), and William Arnold Bainbrigge, Esq., were called to the degree of barrister-at-law.

**January 22nd.**—Richard Martin, Esq., B.A.

**THE HON. DAVID PLUNKETT** has resigned the office of Master of the Court of Common Pleas, in consequence of serious ill-health. Mr. Plunkett had been prothonotary of that court when Lord Plunkett was chief justice, previous to his promotion to the seals.

**LEGAL PROMOTIONS.**—Mr. Serjeant Allen of the Oxford Circuit, and Mr. Serjeant Wilkins of the Northern Circuit, have received patents of precedence. Mr. Miller, of the Midland Circuit, will receive the coif. The vacancies occasioned by the elevation of Mr. Martin, and the retirement from circuit practice of Mr. Whitehurst, have led to several applications to the Lord Chancellor for silk, but at present no determination has been made as to which, if any, gentlemen will be called within the Bar.

**THE NEW MASTERSHIP IN CHANCERY.**—Master Dowdeswell, senior master, resigned the office of head master, which he held for thirty years.

**HENRY JOHN HODGSON, Esq.**, has been appointed Recorder of Ludlow, in the room of **John Buckle, Esq.**, Recorder of Worcester, resigned.

It is our melancholy duty to record the demise of **GEORGE SPENCE, Esq., Q. C.**, which took place under very distressing circumstances, by his own hand, on the 12th of December last. The details of the occurrence are still fresh in the memory of our readers, having been eagerly detailed by the daily press at the time, with that weak desire to gratify a morbid curiosity which is one of the worst errors in taste of the present day.

The deceased had attained his sixty-fourth year (having been born in 1787), and was in the full vigour of his faculties, as his great work, by which his name will be favorably handed down to posterity, fully testifies. Mr. Spence was a pupil in the chambers of the celebrated Mr. Bell, and was called to the Bar by the Honorable Society of the Inner Temple in 1811. He very early acquired an extensive and lucrative practice, and in 1827 entered parliament, succeeding, in the representation of Ripon, Sir Lancelot Shadwell (then Mr. Shadwell, the late lamented Vice-Chancellor); the vacancy being occasioned by the appointment of the latter to be Vice-Chancellor of England, in lieu of Sir Anthony Hart, appointed Lord Chancellor of Ireland. This seat he retained until the parliament which was returned on the 29th of January, 1838, when both Mr. Spence, and his colleague, Mr. Pettit, lost their seats: he never sought another.

It is said that the House of Lords is the grave of the members of the House of Commons. It very often happens that barristers of large practice without the bar at once cease to command an active business on being called within it. This was eminently the case with Mr. Spence. While without the bar, he had the reputation of one of the largest, if not the largest business of all his compeers. But although he had a fair share of leading business in equity for some time after he had been raised to the dignity of a Queen's Counsel (in the Michaelmas Vacation, 1835), he did not as a leader retain the confidence of the solicitors in these courts. Thus deprived of the accustomed objects in the Senate and the Courts of Equity on which to exercise his activity and industry, he turned his attention to legal literature. He was chosen the first lecturer of Lincoln's Inn when an effort was made by the Inns of Court, a few years ago, to establish a regular course of Professional Studies and Examination among candidates for the Bar. The attempt, however, did not succeed, and the lectures were discontinued. At last, after years of patient and indefatigable labour, he gave to the world in 1846 the first volume of his "*Chancery Jurisdiction*,"<sup>1</sup> a work which immediately attracted the attention of jurists, not in England alone, but throughout Europe, displaying as it did a most intimate acquaintance with the antiquities of English and Roman legal literature, and of the influences their

<sup>1</sup> For a detailed review of this first vol. see *Law Mag.*, Vol. VIII. (N. S.) p. 112.

distant streams produce on our modern jurisprudence: qualities which had indeed been indicated by an early work on the same subject, published in 1826, but which the labours and research of twenty years in the study and at the bar had matured and augmented. The second part of this great work, containing the modern practice of the Court of Chancery, was published in the close of the year 1849.<sup>1</sup> Although mention was there made of an intended third volume, yet the work was, in a great measure, complete: and the revulsion of the nervous system, after it had been wound up to undergo, for a series of years, the labour of unceasing attention to minute details, and bringing references from a vast variety of authorities to bear upon one point, proved so oppressing to the spirits as to lead to the melancholy result we have already recorded. It will be remembered that a similar catastrophe, no doubt referable to the same causes, overtook the late Colonel Gurwood within about the same period after he had completed his great work, the "Wellington Despatches."

As a legislator, Mr. Spence distinguished himself by the attention which he bestowed to the subject of legal reform. In 1829-30 he resisted the then proposed appointment of a fourth judge in equity, from a conviction that such a measure would only augment the evils it was intended to remedy. But he was always a zealous reformer of the abuses in these courts: and in 1839 he published a pamphlet, in which he advocated the plan of Lord Langdale for a re-constitution of the Court of Chancery (ante, Art. III.) As a writer and speaker his style was plain, and unornamented by any figures of speech: sensible, clear and practical: and he had the art, or natural gift, of speaking upon abstruse and learned topics without using either abstruse or learned words.

<sup>1</sup> This volume is reviewed, *Law Mag.*, Vol. XXII. (N. S. p. 60.)

## Correspondence.

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### MR. BARBER'S CASE.

[It is our practice to disregard all attacks, either on ourselves or the articles of our contributors, first, because we feel that we and they can well afford to do so, and, secondly, because the public have little or no interest in such controversies.

We therefore give insertion to the following exclusively because Mr. Barber's cause might possibly suffer by its non-insertion.—  
EDITOR.]

We find that with reference to our article in the last number of the Magazine, on the case of Mr. W. H. Barber, a writer in the Legal Observer—apparently somewhat of a freshman in the arts of advocacy—has accused us of gross misrepresentation of evidence, and of an unfounded attack on the judges of the Court of Queen's Bench. Many of our readers may perhaps recognize in this notice of the Legal Observer an awkward attempt to shift public attention from essentials to non-essentials; and to further prejudice Mr. Barber's case in the minds of the judges by the shuffling suggestion that their lordships have been rudely and unjustifiably assailed in our pages. As silence under such a charge would be fair evidence against us, we here emphatically deny it, not from deference to the Legal Observer, but from respect to their lordships. In a subsequent number of the Legal Observer, of date December 21st, 1850, the same writer, whilst endeavouring to justify his exclusion of a letter from Mr. Stevenson, Mr. Barber's attorney, charging the Legal Observer with garbling (a letter since published in pamphlet shape), returns to the charge against ourselves in these terms:—"The ill-timed zeal which dictated the publication of the article in the pages of our quarterly contemporary, seemed to require that the attack it contained on the judges of the Court of Queen's Bench *and* the Incorporated Law Society (*'how we apples swim!'*) should be promptly answered." We do not think so. We cannot think our ill-timed zeal,—if ill-timed it were,—seemed to require that the Legal Observer volunteer should rush into the lists to break a lance with us in defence of the court. Our respect for their lordships of the Queen's Bench rests upon too deep and broad a foundation to allow us to think that they can ever stand in need of such advocacy.

But with the Legal Observer advocate of the Incorporated Law Society we must (notwithstanding we may expose ourselves to the charge of breaking a fly upon a wheel) be a little more particular. The circumstances upon which we are accused of misrepresenting evidence are these. The pardon of Mr. Barber issued on (amongst

other grounds) certain well authenticated confessions of Fletcher, Sanders, &c., most unequivocally exculpating Mr. Barber. These documents having been spoken of, and discussed before the master, their authenticity was admitted by Mr. Maugham of the Incorporated Law Society, and he was at the same time informed that they were lying at the Home Office. On the carrying in of the master's report, and on the hearing of Mr. Barber's late application to the court for the renewal of his annual certificate, Sir Frederick Thesiger, in showing cause on behalf of the Society, said, "that inquiry had been anxiously made as to what had become of the *supposed* confessions of Joshua Fletcher and William Sanders, made in the year 1844; what was done with them; how they were procured, and how they were used; and no satisfactory answer had been given." Mr. Barber and his attorney having months before this informed Mr. Maugham where the original confessions were lying, the former gentlemen were naturally much astonished on hearing Sir F. Thesiger's statement; and Mr. Stevenson promptly applied to Sir George Grey for an explanation. Sir George, by his secretary Mr. Waddington, replied "that no application had been made by the Incorporated Law Society with reference to these documents." As Sir Frederick had of course spoken only under instructions, this answer of Sir George Grey's placed the Law Society in a very unenviable position. Independently of the lie thus given by implication, it showed that the movers in this matter in the Society had gone out of their way, altogether gratuitously, and without the least foundation, to throw dirt upon and discredit Mr. Barber's case in the minds of the judges, by falsely suggesting that the confessions were only supposed ones, and that Mr. Barber could give no satisfactory answer as to "how they were procured," or "what had become of them," although "inquiry had been anxiously made."

We think, then, it must be pretty evident to any man of common sense, that the mere reading of *copies* of confessions, thus spoken of, must have been received by the court with natural suspicion and distrust.

To speak of them thus, then, could only be justified by the literal truth of the statement. But supposing that the statement be a mere fabrication, what can be said or written by any one that can too severely characterise such conduct? And whether it be a mere fabrication or not, the Legal Observer, although evidently speaking as one having authority, does not to this hour say that any inquiries were at any time made, anxiously or otherwise, at the Home Office or elsewhere.

Upon this conduct it was that we said, that the court being by these double dealing tactics shut out from a more special consideration of these most important confessions (the writer, in quoting the above expression, drops the words "more special") were left in the same predicament as the jury were in at the trial. To this statement we are obliged to adhere: for it is idle to speak of copies of confessions being read, which were read only to be repudiated and discredited



before the court. As well say that a forged bill of exchange produced in support of a prosecution was at the same time in evidence as a genuine instrument.

Upon further reflection, then, we think our strictures were too refined and gentle for the occasion. For the court were not only shut out from the evidence; but from the manner in which these confessions were spoken of, the judges were led to think worse of the applicant's case than if there had been no confessions at all. Certainly, had we been in Mr. Barber's position, we would rather have dispensed with such materials altogether than have consented to hear Sir F. Thesiger say of them "that *every inquiry* had been anxiously made as to what had become of these *supposed* confessions—how they were procured—and how they were used; and no satisfactory answer had been given." If we have done the Society injustice in this view of the matter, it is somewhat unfortunate for that body, that another writer, Sir George Stephen, has followed in our wake, in a very able pamphlet lately published, in which with singular industry and acumen this and the other leading points of the case have been discussed with a result entirely opposed to that arrived at by the writer in the *Legal Observer*. In conclusion; we regret, for the credit of the profession, that the *Legal Observer* has not been more successful in the vindication of the Law Society's officers. There is a want of directness and an appearance of disingenuousness, not unmixed with impudence, in his mode of meeting our arguments, that remind us of attorneyism in the contemptuous and disparaging sense in which Carlyle loves to use that term. As a specimen of the impudence, we extract the following:—"As Mr. Stevenson disclaims any knowledge of the writer of the *Law Magazine*, it seems more convenient as well as more reasonable to allow this writer to defend himself from our strictures through the same channel he has chosen for the expression of his opinion on this matter."

As an exhibition of a convicted offender endeavouring to turn the tables on his judge, we have met with no parallel to this demonstration of the *Legal Observer*, since the story told by Lord Bacon. "A thief being in the dock, about to undergo sentence, cried to the officer of the court, 'Mr. Tipstaff, I give that old gentleman seated on the bench in the scarlet gown in custody to you, for I go in danger of my life of him.'"

*M.*

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### TO CORRESPONDENTS.

PYTHAGORAS is thanked for his clever Paper.

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## **Documents, &c.**

### **GENERAL ORDERS AND RULES OF THE HIGH COURT OF CHANCERY.**

**ORDER OF COURT, *November 2nd, 1850.***

#### *Introductory.*

I. The several Orders comprised in the General Order of the 3rd of April, 1828, which are respectively numbered 7, 9, and 10; and the Order comprised in the General Order of the 21st of December, 1833, which is numbered 19; and the Order comprised in the General Order of the 9th May, 1839, which is numbered 6; and the several Orders or parts of Orders comprised in the General Order of the 8th day of May, 1845, which are respectively numbered as the second article of the 14th of the said Order; and the 6th, 7th, 8th, 9th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, and 31st Articles of the 16th of the said Order; and the several Orders comprised in the said last-mentioned General Order, which are respectively numbered 17, 19, 38, 39, 40, 41, and 42; and all other Orders and parts of Orders, so far as such other Orders and parts of Orders are inconsistent with these Orders, but not further or otherwise, are hereby abrogated and discharged.

II. All former Orders and parts of Orders not specified in Order 1, so far as the same are now in force, and consistent with these Orders, or applicable to the same, or the subject-matter thereof, are to remain in full force and effect.

#### *When these Orders are to come into Operation.*

III. These Orders are as to all suits or matters now pending or hereafter to be commenced, to take effect on this 2nd day of November, 1850.

#### *Exceptions to Pleadings, &c., for Scandal, Impertinence, or Insufficiency.*

IV. The times of vacation are not to be reckoned in the computation of the time allowed for filing or setting down exceptions for scandal, impertinence, or insufficiency, in cases where the time is not limited by notice given pursuant to the 13th of these Orders.

V. These Orders do not apply to any reference for scandal, impertinence, or insufficiency pending before any of the Masters at the time when these Orders come into operation; but as to all such references the existing Rules and Orders of the Court are to remain in force.

VI. No Order is to be made for leave to file exceptions *nunc pro tunc*.

VII. A Defendant, whose answer is not excepted to or set down for hearing on former exceptions, alleging that the Plaintiff is prosecuting him in this Court and also at law for the same matter, may, upon the expiration of eight days after his answer, or further answer, is filed, obtain as of course, on motion or petition, the usual order for the Plaintiff to make his election in which Court he will proceed.

VIII. After the filing of the Defendant's answer, the Plaintiff has six weeks within which he may file exceptions thereto for insufficiency.

If he does not file exceptions within six weeks, such answer on the expiration of the six weeks is to be deemed sufficient.

IX. A Defendant desiring to prevent exceptions to his answer for insufficiency being set down for hearing, has for that purpose only eight days after the filing of such exceptions within which he may submit to the same.

X. If a Defendant not being in contempt submits to exceptions to his answer for insufficiency before the Plaintiff has set them down for hearing, he is allowed three weeks from the date of the submission within which he is to put his further answer to the Bill.

XI. The Plaintiff having filed exceptions for insufficiency to a Defendant's answer is not to set them down for hearing before the expiration of eight days from the filing of such exceptions, unless in a case of election he is required by notice in writing from such Defendant to set them down in four days pursuant to the 13th of these Orders, or in a case where the common injunction may be obtained or retained on the allowance of such exceptions.

XII. Exceptions to answers for insufficiency, or to any pleading or other matter depending before the Court for scandal or impertinence, or for scandal and impertinence, are to be set down for hearing by the Registrar, at the request of the party filing the same, upon the production of a certificate of the Clerk of Records and Writs of the filing of such exceptions; or (in the case of exceptions to an answer for insufficiency) of the filing of a further answer, and the same are to be advanced and put in the paper for hearing on an early day, and the party setting down any such exceptions shall on the day on which the same shall be so set down serve a notice thereof on the party whose pleading or other matter is excepted to, otherwise the said exceptions shall be deemed not set down.

XIII. A Defendant, whose answer is excepted to alleging that the Plaintiff is prosecuting him in this Court and also at Law for the same matter, may by notice in writing require the Plaintiff to set down the exceptions within four days from the service of the notice.

And if the plaintiff does not set down such exceptions within such four days, such defendant is entitled as of course, on motion or petition, to obtain the usual Order for the Plaintiff to make his election in which Court he will proceed.

**XIV.** The Plaintiff having filed exceptions for insufficiency to a Defendant's answer, is to set them down for hearing after the expiration of eight days, but within fourteen days from the filing of such exceptions.

If he does not, the answer, on the expiration of such fourteen days, is to be deemed sufficient.

**XV.** The Plaintiff, having shown exceptions to a Defendant's answer for insufficiency as cause against dissolving an injunction, is to set down such exceptions for hearing at the latest on the day next after showing such exceptions as cause.

If he does not the injunction is dissolved.

**XVI.** After the filing of exceptions to a Defendant's answer for insufficiency, and any further answer put in, the Plaintiff has fourteen days from the filing of such further answer within which he may set down the old exceptions.

If the old exceptions be not set down within fourteen days after such further answer put in, the answer is on the expiration of such fourteen days to be deemed sufficient.

**XVII.** After exceptions to an answer for insufficiency are set down for hearing, if a defendant, not being in contempt, submits to answer, or the Court holds the answer to be insufficient, the Court may in such cases appoint the time within which such defendant is to put in his further answer.

If such Defendant does not obtain time from the Court, or does not answer within the time which the Court allows, the Plaintiff may sue out process of contempt against such Defendant.

**XVIII.** The answer of a Defendant is to be deemed sufficient—

1. If no exception for insufficiency be filed thereto within six weeks after the filing of such answer.

2. If, exceptions being filed, the Plaintiff does not set them down for hearing within fourteen days after the filing thereof.

3. If, within fourteen days after the filing of a further answer, the Plaintiff does not set down the old exceptions.

**XIX.** If after a Defendant's second or third answer is filed the Plaintiff sets down the old exceptions for insufficiency, then the particular exception or exceptions to which he requires a further answer is or are to be stated in the notice of setting down such exceptions.

**XX.** If upon the hearing of exceptions the answer be held sufficient, it shall be deemed to be so from the date of the Order made on the hearing; and if the defendant submit to answer without an order from the Court, the answer shall be deemed insufficient from the date of the submission.

**XXI.** The Court holding a first or second answer to be insufficient, may appoint the time within which a Defendant who is not in contempt is to file a further answer.

**XXII.** Upon a third answer being held to be insufficient, the Court may order the Defendant to be examined upon interrogatories to the points held to be insufficient, and to stand committed until he

shall have perfectly answered the interrogatories ; and the defendant is to pay such costs as the Court shall think fit to award.

**XXIII.** No pleading or other matter depending before the Court is to be set down for hearing for scandal or impertinence unless exceptions are taken in writing and signed by counsel, describing the particular passages which are alleged to be scandalous or impertinent.

**XXIV.** Where any person or party having filed exceptions to any pleading or other matter depending before the Court for scandal, and any person or party having filed such exceptions for impertinence, does not set the same down for hearing within six days after the filing thereof, such exceptions are to be considered as abandoned, and the person or party by whom such exceptions were filed is to pay to the opposite party such costs as may have been incurred by such party in respect of such exceptions.

**XXV.** Upon the production of an Order, made upon its being held that any pleading or other matter depending before the Court is scandalous or impertinent, the officer having the custody or charge of such pleading or other matter is to expunge from such pleading or other matter such parts thereof as the Court has held to be scandalous or impertinent, and thereupon the person or party requiring such scandalous or impertinent matter to be expunged, is to pay to the officer expunging the same the same fee as on the like occasion has heretofore been paid.

#### *Orders of Course.*

**XXVI.** Applications to discharge, reverse, or alter any Order made on motion or petition of course by the Lord Chancellor, the Master of the Rolls, or one of the Vice-Chancellors, are to be made to the Judge to whom special applications in the cause or matter in which such Order is made, ought to be made according to the practice of the Court, and the General Rules and Orders applicable thereto.

**XXVII.** Every petition or motion paper for a reference under the 19th section of the said Act is to be marked at or near the top or upper part thereof in the same manner as a bill is now marked with the name of the Lord Chancellor and one of the Vice-Chancellors, or with the name of the Master of the Rolls ; and every order for any such reference is to be marked in the same manner as the said petition or motion paper, and the matter in which such order is made is thenceforth to be considered as attached to the Court of the Judge whose name shall be so marked upon such Order, in like manner and for the like purpose as causes are attached to such Court, but shall be subject to be transferred from such Court in the same manner as causes are so transferred ; and the provisions of the Order comprised in the General Order of the 5th of May, 1837, which is numbered 15, and of the General Order of the 5th of August, 1842, shall apply to every matter so attached.

#### *Fees.*

**XXVIII.** The fees to be received and taken by the Registrars and

their Clerks, and by the Clerks of Records and Writs, and their Clerks respectively, for filing a special case and all proceedings thereupon, are to be the same as are now received and taken by them respectively for filing a Bill and for proceedings in suits instituted by Bill, and the fees to be received and taken by the Registrars and their Clerks for setting down exceptions for scandal, impertinence and insufficiency, and for Orders made thereon, are to be the same as are now received and taken for setting down exceptions and for Orders made thereon.

(Signed)

TRURO, C.

LANGDALE, M.R.

J. L. KNIGHT BRUCE, V.C.

R. M. ROLFE, V.C.

## SOCIETY FOR PROMOTING THE AMENDMENT OF THE LAW.

**GENERAL MEETING, *November 11th*, 1850.—MR. COMMISSIONER FANE in the Chair.**

The Minutes of the last Meeting (the 22nd of July last) were read and confirmed.

David Dudley Field, Esq., of New York, was elected an Honorary Member.

The following Gentlemen were balloted for and elected:—

Thomas Rennie Hutton, Esq., Official Assignee, Bristol.

A. B. Mackintosh, Esq., Solicitor, Calcutta.

Robert A. Slaney, Esq., M.P., Barrister, United University Club, Pall Mall, East.

Thomas Turner, Esq., 2, Pump Court, Temple.

C. Bowyer Adderley, Esq., M.P., Hamshall, Warwickshire.

Leone Levi, Esq., Liverpool.

Edward Wise, Esq., Barrister, 1, Elm Court, Temple.

J. G. J. Greene, Esq., Barrister, 30, Westbourne Terrace, Hyde Park.

Joseph Adshead, Esq., Manchester.

Hunter Gordon, Esq., Barrister, Registrar of the Court of Bankruptcy, Manchester.

A Return was ordered of the several Reports and Papers made and presented to the Society since its establishment in the year 1844, and the results that have attended them.

The Second Report of the Special Committee appointed to carry out the resolutions of the Society relating to the Establishment of a Law School was presented and received.

The First Report of the Committee on Common Law on the following reference was presented:—

“To consider the present state of the Law relating to Process,

Pleading and Practice in the Superior Courts of Common Law."

It was agreed that the Report should be printed, and further considered at the next Meeting.

The following reference was made to the Committee on the Law of Property:—

"To consider the Law of Property as far as it relates to Married Women."

**SPECIAL GENERAL MEETING, November 18th, 1850.—**  
M. D. HILL, Esq., Q.C., in the Chair.

Mr. David Dudley Field, of New York, one of the Commissioners who have prepared the New York Code of Procedure, gave, at the invitation of the Council, some information to the Society with respect to that Code.—The thanks of the Society were voted to Mr. Field.—*Adjourned.*

**GENERAL MEETING, December 9th, 1850.—** M. D. HILL, Esq., Q.C., in the Chair.

The Minutes of the two last Meetings (the 11th and 18th of November last) were read and confirmed.

The following Gentlemen were balloted for and elected:—

James Wyld, Esq., M.P., 8, Park Ville, West, Regent's Park.

John D. Fitzgerald, Esq., Q.C., 1, Merrion Square, Dublin.

William Howard Russell, Esq., Barrister, 4, Garden Court.

Jelinger C. Symons, Esq., Barrister, 1, Harcourt Buildings, Temple.

G. Hammond Whalley, Esq., Barrister, 2, Paper Buildings, Temple.

John Rees Mogg, Esq., Solicitor, Temple Cloud, near Bristol.

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It was resolved—That having reference to the proceedings of this Society on the 18th of November last, when Mr. David Dudley Field explained the operation of the New York Code, (by which the distinction of procedure in the Court of Law and Equity has been abolished,) questions relating to the working of this Code should be extensively circulated among Lawyers, Merchants, and others residing in New York and other States of America.

The First Report of the Committee on Common Law on the following reference:—"To consider the present state of the Law relating to Process, Pleading and Practice in the Superior Courts of Common Law," was received.

It was resolved—"That the Secretary be instructed to write to the County Court Judges to ask whether, in their judgment, the Law which enables parties to be examined as witnesses in the County Courts had worked well or ill?"



**GENERAL MEETING, *January 13th*, 1851.—MR. COMMISSIONER FANE, in the Chair.**

The Minutes of the last Meeting (the 9th of December last) were read and confirmed.

The following Gentlemen were balloted for and elected :  
 Robert Lowe, Esq., Barrister, 2, Paper Buildings, Temple.  
 James Lord, Esq., Barrister, 31, Bedford Square.  
 Acton, S. Ayrton, Esq., of the Middle Temple, 43, Dover Street, Piccadilly.

A Communication from Mr. David Dudley Field, containing the opinion of some of the Judges of the State of New York as to the operation of the New Code, was read ; and

It was resolved—That a Committee be appointed, to consider whether the principles of Law and Equity could not be administered in the same Courts, and in the same form of proceeding ; and in making such inquiry the Committee are requested to take into consideration the provisions of the New York Code. The Committee to consist of the following Members :—

Mr. Commissioner Fane ; Mr. M. D. Hill, Q. C. ; Mr. Bethell, Q. C. ; Mr. Pitt Taylor ; Mr. Creasy ; Mr. Trower ; Mr. Vansittart Neale ; Mr. James Stewart ; Mr. D. Power ; Mr. Massey ; Mr. William Hawes ; Mr. Alderman Salomons ; Mr. Elliott ; Mr. Robert Lowe ; and Mr. Acton S. Ayrton.

The Secretary having (according to the instructions of the Society at the last Meeting) written to the County Court Judges, to ask whether, in their judgment, the Law which enables parties to be examined as witnesses in the County Courts, had worked well or ill ? the several answers received were communicated to the Society, and ordered to lie upon the table ; and

It was resolved—That the thanks of the Society be returned, individually, to those County Court Judges who have so kindly given their opinion on the subject.

*Adjourned till Monday, the 10th day of February next, at Eight o'Clock in the Evening precisely.*

**GRAY'S INN, *Hilary Term*, 1851.—**The Lecturer has given Notice (with the consent of the Benchers), that the Annual Voluntary Examination in Law of Students for the Bar will take place in the Hall of the Society, in next Trinity Term, viz., on the 5th and 6th days of June. The competition for honours, and for the Lecturer's prize (a set of the Reports of Vesey, jun.), is restricted to those Students who, from the present Term to the time of Examination, may be attending Mr. Lewis's Lectures.

## List of New Publications.

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**Amos**—An Introductory Lecture on the Laws of England, delivered in Downing College, Cambridge. By A. Amos, Esq., Barrister. 8vo. 1s. 6d. sewed.

**Anstey**—The Queen's Supremacy considered in its Relations with the Roman Catholic Church. By T. C. Anstey, Esq., M.P., Barrister. 8vo. 1s. 6d. sewed.

**Archbold**—Jervis's Acts, 11 & 12 Vict. cc. 42, 43 and 44, relating to the Duties of Justices of the Peace out of Sessions, as to Indictable Offences, Convictions and Orders, and to the Protection of Justices in the Execution of their Duties; with Practical Notes and Forms. By J. F. Archbold, Esq., Barrister. Third Edition, 12mo. 8s. cloth.

**Baily**—General Average, and the Losses and Expenses resulting from General Average Acts, practically considered. By L. R. Baily. 8vo. 6s. boards.

**Barnes**—The Papal Brief considered with Reference to the Laws of England. By R. Barnes, Solicitor. 8vo. 2s. 6d. sewed.

**Bartlett**—A Treatise on British Mining; with a Digest of the Cost Book System, Stannary and General Mining Laws. By T. Bartlett. 8vo. 4s. cloth.

**Calvert**—Second Letter to the Hon. Sir Charles Wood, Bart., M.P., upon certain Laws affecting Agriculture. By Frederick Calvert, Esq., Q.C. 8vo. 1s. sewed.

**Cabinet Lawyer (The)**—A Popular Digest of the Laws of England. Fifteenth Edition, with Supplement. Foolscep 8vo. 10s. 6d. cloth.

**Cay**—An Analysis of the Scottish Reform Act, 2 & 3 Will. 4, c. 65, with the Decisions of the Courts of Appeal. By J. Cay. 8vo. 30s. cloth. (Edinburgh.)

**Chitty**—A Practical Treatise on the Stamp Laws. By J. Chitty, Esq., Barrister. Third Edition, with the New Stamp Act, 1850. By S. Atkinson, Esq., Barrister. 12mo. 14s. boards.

**Chitty**—A Collection of Statutes, with Notes thereon, intended as a Circuit and Court Companion. By J. Chitty, Esq., Barrister. Second Edition, containing all the Statutes of Practical utility in the Civil and Criminal Administration of Justice to the present Time. By W. N. Welsby and Edward Beavan, Esqrs., Barristers. Vol. I. (to be completed in 3 Vols.), Royal 8vo. 42s. cloth.

**Clements**—On the Law and Practice of Bankruptcy in Ireland. By E. Clements, Esq., Barrister, 8vo. 16s. boards. (Dublin.)

**Cooke**—A Treatise on the Law and Practice of Agricultural Tenancies, with Forms and Precedents. By G. W. Cooke, Esq., Barrister. 8vo. 18s. boards.

**Daniell**—A Supplement to Daniell's Chancery Practice, containing the Statutes, General Orders and Decisions to the commencement of the year 1851, with Notes and an Index. By T. E. Headlam, Esq., M.P., Barrister. 8vo. 10s. boards.

**Dart**—A Compendium of the Law and Practice of Vendors and Purchasers of Real Estate. By J. H. Dart, Esq., Barrister. 8vo. 21s. boards.

**Foster**—A Practical Treatise on the Writ of Scire Facias. By T. C. Foster, Esq., Barrister. 8vo. 15s. boards.

*Glen*—The Small Tenements Rating Act, 13 & 14 Vict. c. 99, and the other Poor Law Statutes passed in the Session of 1850, with Notes and Index. By W. C. Glen, Esq., Barrister. Second Edition, 12mo. 2s. boards.

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THE  
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ART: I.—CONVERSION BY DEED.

Griffiths v. Ricketts, 7 Ha. 299.

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THE question in this case arose upon a deed, by which Edmund Griffiths conveyed all his real and personal property to trustees upon trust to sell with all convenient speed for the payment of his debts, and in case there should be any surplus of the sales-monies, upon trust to pay the same to the said Edmund Griffiths, *his executors, administrators and assigns*, to and for his and their own absolute use and benefit. The deed contained a covenant by Griffiths not to revoke the powers, nor to interfere in any way in the execution of them, and for further assurance. No sale took place during the life of Edmund Griffiths, but after his death the question arose between his real and personal representatives, whether this deed operated as a conversion; and the Vice-Chancellor (Wigram) decided that it did, and that the personal representatives were alone entitled, and that they took as trustees for the next of kin, and not for the heir.

“The question to be answered, it must always be remembered,” said the Vice-Chancellor, “is not whether the surplus proceeds of the trust estates are real or personal estate, but to which of the testator’s [he should have said grantor’s] representatives those proceeds, whether real or personal estate, belong.

“If the question arose under the will of Edmund Griffiths,” continued the Vice-Chancellor, “and not under his deed, I should perhaps have had little difficulty in answering the question; I should follow my own decision in *Fitch v. Weber*,<sup>1</sup> which was founded upon *Robinson v. Taylor*<sup>2</sup> before Lord Thurlow. The will speaks from the death of the testator, and whatever is deemed real estate at his

<sup>1</sup> 6 Ha. 145.

<sup>2</sup> 2 B. C. C. 589.

decease goes to his heir. A contemporaneous declaration that his real estate shall be turned into personalty may alter the character of the property which the heir-at-law takes; but unless it be given away from the heir, there is no reason why he should not take it, although the trusts of the will may compel him to take it as personal estate, and not as real estate.

“ But a deed differs from a will in this material respect. A will speaks from the death,—the deed from delivery. If then the author of the deed impresses upon his real estate the character of personalty, that, as between his real and personal representatives, makes it personal and not real estate from the delivery of the deed, and consequently at the time of his death. . . . . The principle is the same in the case of a deed as in the case of a will; but the application is different, by reason that a deed converts the property during the lifetime of the author of the deed, whereas a will does not affect the conversion till the death of the testator; and there is no principle on which the court, as between the real and personal representatives of the deceased (between whom there is confessedly no equity), should not be governed by the simple effect of the deed in deciding to which of the two claimants the surplus belongs. . . . . ‘ There is no weight,’ says Sir William Grant,<sup>1</sup> ‘ in the circumstance that the property is found in the shape of money or land, for the character is to be found in the deed,’ not in the accidental status of the property. . . . .

“ The question remains, however, as to the surplus property sold after the death of Edmund Griffiths, or not required to be sold to pay his debts. The answer to this must be found in the deed. I can understand the argument, which alters the nature of the property according as it is actually sold or not sold; but I cannot understand the reasoning, which in the case of a deed would give the surplus to a different person according only to the time when the trustees may happen to execute the trust for sale. In the absence of authority therefore I should conclude that the personal representative of Edmund Griffiths, and not his heir, is the party entitled to the surplus of the property comprised in the deed of 1810.

“ With respect to authority, *Biggs v. Andrews*<sup>2</sup> is a direct authority in point. It is true indeed that the language of the deed in that case does in a popular sense express more clearly than the language in the present case the intention that the surplus property should become personal estate; but the limitation of the surplus to Edmund Griffiths, his executors, administrators and assigns, expresses in technical language all that is expressed in popular language in *Biggs v. Andrews*; and I am not at liberty to suppose that Edmund Griffiths, using technical language, did not understand what it meant.

“ I think therefore, both upon principle and authority, the personal representative of Edmund Griffiths, and not his heir-at-law, is the

<sup>1</sup> *Thornton v. Hawley*, 10 Ves. 129.

<sup>2</sup> 5 Sim. 424.

party entitled to the surplus of the property comprised in the mortgage of 1810.

“Many dicta may be found in apparent conflict with what I have decided; but the dicta will, I believe, be reconciled with the present decision, by adverting to this, that those dicta are applied to wills, and not to deeds, or to deeds in which there has been no disposition of the ultimate surplus, or none inconsistent with the rights of the heir.”

We have given all the principal portions of this decision, because the principles laid down are of great importance and extensive practical application, and also because they appear to be opposed not merely to dicta, as the Vice-Chancellor states, but to at least one decided case (not however cited in argument), and to the opinion of more than one conveyancer and text-book writer of that class whose recorded opinions are little less weighty than judicial dicta.

To the distinction drawn by the Vice-Chancellor with regard to the operation of deeds and wills—the former from the date of delivery, the latter from the death of the testator—we do not feel that exception or addition can be made. And having regard to this difference as to the times of operation, and the consequences of it, we conceive that, as stated by the Vice-Chancellor, the principles which regulate the decision of the question “conversion or non-conversion” in wills are exactly applicable to deeds.

The question has arisen much more frequently upon wills. But probably the most numerous class of deeds which come within the decision in *Griffiths v. Ricketts* are mortgages with power of sale. The trusts of the sales-moneys to arise upon an exercise of the power direct payment of the surplus to the mortgagor, his executors, administrators and assigns, almost as often as to the mortgagor, his heirs and assigns; and in such case, according to the principles laid down in *Griffiths v. Ricketts*, the next of kin or personal representatives would at the death of the mortgagor be entitled to the equity of redemption, and not the heir of the mortgagor—a conclusion, we will be bound to say, not in one case out of a hundred intended by the parties. A mortgagor may mean by such a clause that, in the event of a sale taking place after his decease intestate, as to this equity of redemption, his executor or administrator, not his heir-at-law (who might possibly be an infant, a feme covert or non compos), should be the hand to receive the surplus monies, and give discharges, but should hold them in trust for the heir, which opinion appears to us (since in the conflict of decision we may advance



an opinion of our own) to be most probably correct; or the mortgagor may mean, and this also is to a certain extent consistent with the redemption clause (which, we suppose, in a mortgage of freehold is invariably given to the mortgagor, his heirs and assigns), that, if the lands are redeemed, they shall continue real estate; but if the power of sale be executed (after his decease—we are not here considering any case where the sale takes place during the lifetime of the mortgagor, when the conversion is of course a *fait accompli*), then the proceeds to be personal estate to all intents and purposes.<sup>1</sup> But neither of these views are consistent with the principles set forward in *Griffiths v. Ricketts*. The former view is clearly altogether opposed to that case; and the latter view is equally opposed, if we recollect the statement of Sir William Grant, quoted and approved by the Vice-Chancellor, that it is immaterial in what shape the property is found, as the *character* is to be determined by the deed; i. e. whether the property consist of surplus sales-mones *after* a sale under the power, or an equity of redemption *before* any sale, the person entitled to it upon the death of the testator must be determined from the deed, not from any dealings with the property under the deed, in which the mortgagor had no interest, and over which he had no control.

The only construction to be put upon such a mortgage, consistent with the principal case, is, that it is a conversion out and out immediately upon the execution of the deed. And that this is so is abundantly clear by the expressions of the Vice-Chancellor, “that the technical language in the case of *Griffiths v. Ricketts* expressed all that was expressed in popular language by *Biggs v. Andrews*.” For in that case the point arose under a deed, or rather a series of deeds of even date, carrying out the same design, and reciting the fact of *Biggs* being indebted to sundry persons, and his desire to wind up his affairs, and that his real and personal estate should be converted into money and the debts due from him paid, and the debts due to him gotten in; and then there was afterwards the same declaration as in *Griffiths v. Ricketts*, that the surplus monies should be paid to *Biggs*, his executors, administrators or assigns; words which, according to the Vice-Chancellor, express in themselves all which could be gathered from the previous statements, which were, therefore, mere surplusage. There is, in point of fact, very little, if any, substantial distinction between a mortgage with power of sale and a deed of trust for sale and payment of

<sup>1</sup> These last ten or twelve words are now not unfrequently introduced at the end of the declaration of trust of the sales-mones.

debts; unless there be any distinction in the fact of the latter providing for the payment of several debts, and the former for but one. And although there should be in the latter deed no express clause for redemption, yet the author of a creditor's deed could certainly claim a re-conveyance on payment of the scheduled debts, if the security were limited by a schedule, or on proof of all debts being satisfied, if the deed were general for payment of all debts.<sup>1</sup> Nor could any reliance be placed on the direction for a re-conveyance, as implying a recognition of the subject still continuing in its original shape. This would be a mere implication at most, and not the direct meaning, technical or otherwise, of the technical terms employed in the proviso for redemption. It could not be stronger than the contrary implication to be drawn from the recitals in *Biggs v. Andrews*. And these, as we have seen when there is in the same deed a direction to pay the surplus monies to the author of the deed, his executors, administrators or assigns, are mere surplusage, and do not add to nor take from the force of the deed. Therefore such an implication, if any, to be drawn from the clause for redemption would be overborne and silenced by the express technical meaning of this latter direction as to the payment of the surplus.

There is, therefore, we think, little doubt but that the decision in *Griffiths v. Ricketts* affects the construction of all mortgages with power of sale, containing a direction to pay the surplus sales-monies to the mortgagor, his executors, administrators and assigns; and that it in effect renders the equity of redemption in such a deed personalty, from the date of its delivery—a decision so important, both in its own nature and from the numerous instances in which it may be applied, that it deserves the most attentive consideration, especially if it appear to be a new construction.

The Vice-Chancellor, as will be seen by the extract which we have given of his judgment (ante, pp. 145, 146), professes to ground his decision both on principle and authority; and it behoves the man to be cautious who attacks so careful a judge entrenched in such a commanding position. Yet, to begin with the authorities on which he relies: "*Biggs v. Andrews*," says the Vice-Chancellor, "is a direct authority in point . . . . The limitation to E. G., his executors, administrators and assigns, expresses in technical language all that is expressed in popular language in *Biggs v. Andrews*: and I am not at liberty to suppose that, using technical language, he did not understand its effect." We

<sup>1</sup> See Lord Langdale's observations, *Matson v. Swift*, 8 Beav. 368; see p. 375; post, p. 155.

would wish to speak with all deference, but a plainer *petitio principii* can hardly be supposed than is here put forward. The exact question to be determined in *Griffiths v. Ricketts* was, whether the reservation of the surplus to Griffiths, his executors and administrators, amounted to a declaration on the part of Griffiths that he intended his surplus interest in the land to be converted into money: in *Biggs v. Andrews* the author of the deed had explicitly declared such to be his intention on the face of the deeds. If, then, we are to be told that the terms of the reservation to Griffiths were the proper technical terms for expressing such an intention, *cadit quæstio*,—what more remains to be decided? Is it logical to assume this, which is, in fact, a conclusion on the whole question—to make it the major in the syllogism, the ground for bringing in *Biggs v. Andrews* as an authority in the principal case? The similarity of the decisions in the two cases would be a good ground for arguing hereafter (apart from the dictum of the Vice-Chancellor) that the terms of the deeds in *Biggs v. Andrews*, and *Griffiths v. Ricketts*, though dissimilar, were in fact equivalent in effect. But we cannot even surmise that equivalency of effect, except by assuming an identity of the decisions in the two cases as a foregone conclusion.

The only other authority relied upon by the Vice-Chancellor is the case of *Van v. Barnett*,<sup>1</sup> “as explained by the plaintiff’s counsel.” The nature of these “explanations,” as far as they may be gathered from a note, and also the decided fact in that case, upon which the Vice-Chancellor relied, seems to be, that under similar trusts certain portions of the real estate having been sold out and out in the lifetime of Van (the author of the deed), and the residue contracted to be sold, and then Van having filed his bill, “not to revoke the deed of trust, but, in fact, to have the trust for sale carried out under the direction of the court,”<sup>2</sup> the real character was held to be taken away from the land. Certainly, that appears to be the consistent view taken by all the decisions; but every judgment in which that is a decided point notes the distinction to be made when the sale does not take place in the lifetime of the author of the deed, or when the author of the deed indicates his intention to take the surplus as realty; whereas in *Van v. Barnett* the sale took place in the lifetime of Van, and he sought to carry out the trusts. And in the judgment in that very case of *Van v. Barnett* the distinction was taken; and it is, in fact, to some of the expressions of Lord Eldon in that judgment that Lord Langdale alludes in his judgment in *Matson v. Swift* (post, p. 155). The

<sup>1</sup> 19 Ves. 102.

<sup>2</sup> 7 Ha. 313, n. (b).

reason upon which Lord Eldon founded his whole decision was, that the heir of Van being an infant could not make his election, or give even "slight" indications of an intention to preserve the character of realty; and Van himself, as stated in the above extract from the "explanation" made in *Griffiths v. Ricketts*, so far from evincing a desire to take the surplus as realty, actually filed his bill to have the trusts for sale carried into execution.

These two cases are the only authorities upon which the Vice-Chancellor relies. We have striven hard to reconcile them with his decision; but we must say that the one case, *Biggs v. Andrews*, seems only brought in by palpably begging the question,—and the second case of *Van v. Barnett*, especially as explained by the counsel for the plaintiffs (though on these explanations the Vice-Chancellor seems to rely in his judgment), seems to arise on totally different circumstances, viz. sales during the lifetime of the author of the deed, and not only no repudiation of the effect of the sales, but a bill actually filed by him to have the trusts for sales, which it was alleged had been unjustly put in action, carried into execution under the decree of the court; and the whole case seems, as far as can be gathered from the expressions of Lord Eldon, to warrant an entirely different conclusion from that of the Vice-Chancellor in the principal case.

Let us now see if the Vice-Chancellor has been more fortunate in the principles upon which he has based his judgment. Now with respect to the preliminary principles enunciated, we apprehend they are stated with the fullness and clearness which render the decisions of the late Vice-Chancellor in general so valuable: Nothing can be better than the statement of the real point at issue, viz. who is the person to take? not what is the nature of the property to be taken: and that this is to be decided, not by the shape in which the property may happen to be found at the time the dispute arises, but by the acts of the author of the deed: or again, than the distinction drawn between cases of conversion under deeds and wills; that the principles are the same, but the application of those principles different. But the Vice-Chancellor becomes singularly unlike himself in the last and most important steps of his argument, when he comes to apply the principles so well laid down, to the case before the court: "I can understand the argument which alters the nature of the property accordingly as it is actually sold or not sold; but I cannot understand the reasoning which in the case of a deed would give the surplus to a different person according only to the time when the trustees may exercise their power of sale." Now that which the Vice-Chancellor here

terms an "argument" is no argument, but a fact. It is a fact, that if land be sold, and thus actually converted into money, the nature of the property is altered: it is a fact, that until converted into money its nature remains unaltered. But, as the Vice-Chancellor himself, only a few paragraphs before, had observed, the change is quite immaterial,—the question in every case of equitable conversion is, not what is the nature of the estate, real or personal, but to which of the claimants, the heir or the next of kin, does the estate, real or personal, belong. So that, whether argument or fact, the proposition is not necessary to be considered. Nor is his Honor more fortunate in the other branch of his sentence,—in which, as in the first, he appears not only to fail in accuracy of expression, but in accuracy of apprehension. The "reasoning" which he alleges his inability to understand is nowhere, that we are aware, put forward; at least as a "reasoning;" though it may be put forward as one of the facts proper to be stated: "*Post hoc: at non ergo propter hoc.*" It does not seem absurd to rely upon this circumstance, (viz. that the sale takes place after the death of the author of the deed), as one which, together with others, may constitute a state of affairs affording a less certain evidence of his intention to disappoint his heir-at-law than if the sale had taken place in the lifetime of the author of the deed; or even affording grounds for declining to presume such an intention. If a sale be made during his lifetime he can hardly be supposed not to be aware that his heir-at-law's expectancy is gone, or not to acquiesce in that state of things. The use and possession are united;<sup>1</sup> and he must know that his equity of redemption is gone, and that in its place he has become possessed of a sum of money. But if no sale take place during his lifetime, it may well be that he did not contemplate the destruction, or rather the transfer, of that expectancy: and we only ask that his intention to acquiesce in that transfer may, under these circumstances, not be irrefragably presumed.

There is this further want of logical accuracy in the application by the Vice-Chancellor of the principles so well laid down at the commencement of his judgment. After pointing out the difference between the cases of a will and a deed, arising from the different times at which they respectively speak, he argues as if, under a deed, we could only look to the state in which matters stand at the time of the delivery. The rule is, we apprehend, not so, but rather thus: where the question "conversion or no conversion" arises upon acts *inter vivos*, we must look

<sup>1</sup> See *Rashley v. Masters*, 1 Ves. jun. 201; post, p. 156.

solely to the state in which matters stand at the time of the last of these acts : at the time, in fact, when the transaction is complete. If, therefore, the deed in *Griffiths v. Ricketts* operated as a complete conversion, we should not be required to look beyond it. But the Vice-Chancellor, while progressing towards a conclusion, refuses to look beyond the date of delivery ;—assuming therefore, that the deed does operate a complete conversion, which is assuming the whole question at issue, and another *petitio principii* in addition to that previously pointed out.

We have ventured thus boldly to impugn both the principles and the authorities upon which the Vice-Chancellor relies, because an exactly contrary decision appears in the reports in a case which does not appear to have been quoted either in the argument or judgment in *Griffiths v. Ricketts*, but in which exactly the same point was raised,—the case of *Wright v. Rose*, before Sir John Leach.<sup>1</sup>

In that case there was a mortgage in fee, with power of sale, and there was a direction to pay the surplus sales-monies to the mortgagor, his executors, administrators or assigns. The mortgagor was illegitimate, and died without issue and intestate, but the crown withdrew its claim. After the death of the mortgagor a sale took place, and a bill being filed by the administrator against the mortgagee for the surplus monies, the judgment of the Vice-Chancellor, allowing a general demurrer for want of equity, was in these terms : “ If the estate had been sold by the mortgagee in the lifetime of the mortgagor, then the surplus monies would have been personal estate of the mortgagor, and the plaintiffs would have been entitled. But the estate being unsold at the decease of the mortgagor, the equity of redemption descended to his heir, and he is now entitled to the surplus produce.” This is the whole judgment as reported ; nor is the statement of facts contained in many more words than we have made use of. The report states that it did not appear in the pleadings to whom the equity of redemption was reserved, but it was probably reserved to the heir, from the expressions used by the Vice-Chancellor ; and yet, under the circumstance of there being no heir, those expressions do not seem very carefully chosen, so that we should be careful not to place too much weight upon them. The judgment is however quoted, as containing the rule of law on the subject, by Mr. Coote in his *Treatise on Mortgages*, p. 157, (edit. 1841,) and was quoted and relied on in *Matson v. Swift* (8 Beav. 368), and other cases.

The case of *Wright v. Rose* has also been quoted by another

<sup>1</sup> 2 S. & S. 323.



text-book writer of very great authority, Mr. Hayes;<sup>1</sup> and he only objects to the dictum in the first part of the judgment above quoted, that if the sale had taken place in the lifetime of the mortgagor, the surplus monies would have been personal estate.

"This," says Mr. Hayes, "is a mere dictum. Upon principle, the effect of a power must be confined to the particular purpose for which the power is given, viz. that of merely letting in the debt and principal as a charge upon the land \* \* \* Nothing short of the concurrence of the mortgagor in a sale, or of a very express declaration of intention, should be allowed to operate as a sale in equity as between his real and personal representatives. Otherwise the destination of the surplus would rest with the mortgagee, and be exposed to accident, caprice, and even to collusion, contrary to every principle of equity. The power of sale is merely auxiliary to the mortgage, which in equity amounts only to a charge, leaving the surplus produce of the sale, not less than the unexhausted interest in the land, essentially real estate."

The principle here put forward, as containing the key to the proper meaning of the clause, can hardly be gainsaid,—at all events it seems unimpeachable when the author of the deed dies before any sale is made, although its application may be denied where the sale took place during his life. Even if these authorities should appear to contradict each other, and so far mutually destroy each other's credit, yet they deserved consideration in the case of *Griffiths v. Ricketts*, but they were not even quoted.

In *Matson v. Swift*<sup>2</sup> the precise point arose; but there, the party seeking to enforce the conversion was the crown, demanding probate duty on the surplus. Lord Langdale held, that whatever were the equities between the parties claiming under the author of the deed, the crown had no right to ask the court to enforce those equities for its own purposes. This case was not cited in the argument on *Griffiths v. Ricketts*; and indeed, though the circumstances were similar, the position and rights of the parties claiming the interference of the court were so different, that the decision in one case could not govern the decision in the other. Yet several of his lordship's expressions in his elaborate judgment bear most clearly upon the case before Vice-Chancellor Wigram. As between the real and personal representatives, the question in what state the property is found, whether money or land, at the mortgagor's decease, matters nothing, as Sir James Wigram justly remarked (*ante*, p. 145). But as regards the payment of the probate duty, it matters every-

<sup>1</sup> 2 Conv. p. 144, n. 133, ed. 1840.

<sup>2</sup> 8 Beav. 368.



thing. "The probate," says Lord Langdale (8 Beav. 377), so far as it relates to the grant of administration, has regard only to the personal estate within the jurisdiction which the testator had whilst living and at the time of his death; and the probate duty is payable only upon the personal estate, i. e. upon the personal estate within the jurisdiction which he had while living and at the time of his death." But that Lord Langdale held no such principle as that involved in Sir James Wigram's decision appears clearly stated in so many words in a previous part of his observations.

"A conveyance by the owner of real estates upon trust to sell it for a particular purpose, as for payment of debts, with a direction to pay the surplus purchase-money to the owner, his executors, administrators and assigns" (which was almost in words the case as reported of *Griffiths v. Ricketts*), "may have, and in some cases has" (not "necessarily must have in every case," the only mode of expression consistent with the decision in *Griffiths v. Ricketts*), "the effect of inducing this court to apply to the property, in whatever state it may be found, the rules of distribution which are commonly applicable to personal estate only."

"After such a conveyance," his lordship proceeds, "an equity in the lands remains in the owner, and after satisfying the pecuniary claims which he has rendered obligatory, either out of the land itself or by other means, he may require the trustees to reconvey to him either the whole estate or any surplus of it; or may by declarations, which have been called 'slight,' take from the property the personal character which has been impressed upon it. If he do not intervene, and no sale is made in his lifetime, then at the time of his decease this court has jurisdiction to give effect to his apparent intention, and will for that purpose consider the person in whom the legal estate is vested (whether trustee created by the deed or heir entitled by descent), as a trustee for that purpose, but not for any other purpose; *so that if there be not by the deed, by devise, or otherwise*, an apparent intent to take the surplus from the heir, the heir will in equity be held entitled to the surplus, though it may have actually been converted into money by the trustees in making sales in pursuance of the trusts, and for the purposes of answering the intention actually appearing."

Certainly, it could not have been in the mind of the learned judge who uttered these words, that the supposed deed, the effect of which he was pointing out, did in itself contain an irresistible declaration of intention to take the surplus from the heir, and to bestow it on the next of kin, as Sir James Wigram held in *Griffiths v. Ricketts*; the circumstances in which were, in fact, exactly the same as in the case contemplated by Lord Langdale in the foregoing extract from his judgment.

The earlier authorities on the subject we shall not think it important to examine here; although authorities are, in fact,

not very numerous on the point, as may be seen by the Vice-Chancellor only referring to two. The earlier decisions are examined and summed up in *Van v. Barnett*, which, though relied upon by the Vice-Chancellor, we claim as making in favour of the heir; or rather, we lay aside as arising upon quite different circumstances. *Biggs v. Andrews*, the only other authority relied upon, we have shown to contain expressions which put the intention of the parties beyond a doubt; and to assume (before arriving at a decision in *Griffiths v. Ricketts*) that the expressions in the one case are the exact equivalent of the expressions in the other case, is a direct *petitio principii*. We have adduced one decided case directly contrary to this part of the judgment in *Griffiths v. Ricketts*; and we adduce the respectable authorities of Mr. Fonblanque, Mr. Hayes, Mr. Coote, Mr. Davidson,<sup>1</sup> and others, supporting, acquiescing in, or going beyond, the decision in *Wright v. Rose*, besides the clear opinion of Lord Langdale in *Matson v. Swift*, in the same sense. But, dangerous as it would be to follow *Griffiths v. Ricketts*, it is extremely hazardous to disregard it, and it would be very desirable to have the point set at rest by a competent authority. Probably a middle term might be found, giving some effect to the express nomination of the executors and administrators of the mortgagor, by understanding these words to give the executors, &c. the right to receive the money, but to hold it in trust for the heir, as before suggested. Whereas the case of *Wright v. Rose*, in which a general demurrer for want of equity was allowed, seems to deny all force whatever to this expression.

### B.

<sup>1</sup> 3 Martin's Conv. 477, and n. Mr. Lewin (*Trusts*, 542) disapproves of it, but gives no reasons, and one very inadequate authority. The unanimity of two careful writers like Mr. Hayes and Mr. Davidson in such a case, a pure conveyancing question, is very important. Mr. Sweet professes to state and approve of the doctrine in *Wright v. Rose*, but apparently without being aware of the point decided or the facts upon which it arose. Mr. Fonblanque's view is very clear, quoting and relying upon Lord Thurlow's expressions in *Rashley v. Masters*, 1 Ves. jun. 201. "The Court has sometimes gone too far, insisting that after the uses and possession are united in the same person, they shall yet go to the heir, unless there is some instrument or intention declared that it is to be considered personalty. *But here the uses and possession were never together; therefore this is to be considered as land.*" See 1 Fonbl. b. 1, c. 6, § 9; 2 Fonbl. b. 1, c. 4, § 2.

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## ART. II.—LAW REFORM—JUSTICE TO SCOTLAND.

IN our last Number we took occasion to offer a practical review of the New Code of Civil Procedure of New York, and we now propose to extend our remarks to a more general consideration of the subject of law reform, as entertained in this country, and accomplished by the legislature of the chief American state. Nor shall we omit to pay a just tribute to the lawyers of Scotland, whose legal system has so remarkable a bearing on the changes proposed among us, but which has hitherto been so strangely overlooked. Law reform is still the great, the engrossing topic. The reflections to which it gives rise seem exhaustless; and the evil, the corruption, and abuse against which it is directed, are so manifest and so universally acknowledged, that intellectual inquiry is almost enervated by its very independence. Justice is at last putting English law on its trial—thoughts are free, and first principles are let loose on antiquated invention. But we would not speak without our book, nor allow that which some may not scruple to call a popular conceit to invert the fair order of presumptions. We would be wise in our generation, and put a check on the rashness of reforming judgment.

In a country like England, where the authority of the laws and constitution is so firmly established, it may be dangerous, and is at all times unwise to regard, without the cautions of hesitation and doubt, any suggested innovation. More especially ought such to be the reflection of honest allegiance when the proposed change is of a fundamental nature, and where administrative principle, and not mere administrative form, is in question. We believe it may be so predicated of the subject of this article. One more important, or more needing the guidance of the sound and well-informed judgment, could not occupy public attention. The movement, indeed, is such as in several of its features to appear to review with some severity not a few of the pages of English history. There is a demand for a change in our system of justice, uttered in such a tone, as, critical in the beginning and sceptical in the end, would make free with the pompous peculiarities of our traditional law. It is clear that had the recusant barons of England lived at the present day, their *nollumus leges Angliæ mutari* would not have been enough, but they would have had to argue the question. Lord Mansfield would now be the most popular of judges, and Junius would be regarded as a dull and malignant empiric. The laity,

the non-legal portion of the community, are getting bold ; they are willing to invade the province of the lawyers, and to deal plainly, if not irreverently, with the machinery of a great art they would improve, by divesting it of the mystery in which it is enveloped by its technical craft.

But the call for this legal reform is not a merely popular cry—it has stirred the mind of the profession itself, and lawyers are among the foremost to encourage the work. With these combined elements of the national discussion, with the enlightenment of popular intelligence, and the aids of professional skill, it may be anticipated not only that something will be done, but that, under the influence of a spirit of thoughtful deliberation, nothing rash or heedless will be attempted. It is, therefore, with hopeful feelings that we now contemplate the subject. Nor from the indications afforded by the public consideration which it has already undergone need we be alarmed into any misapprehension as to the nature of the measure which the legislature will be asked to consider. It will, we believe, be one essentially conservative—conservative of our constitutional law and of the characteristic principles of our jurisprudence ; and for this simple reason, that we anticipate an improved method of procedure by which these governing influences will be more purely and efficiently applied in the administration of the legal tribunals.

That the law of England itself demands some such serious reform in the system of the courts cannot be denied. There seems to be a general understanding, an agreement of mind, an assent of opinion among the wise and prudent of the land,—tacit in some quarters, expressed in others,—that this has indeed become a great necessity. The *denegatio justitiæ* which has, we fear, long been the bad pre-eminence of no mean proportion of Westminster Hall should cease, and judicial activity be infused into its chambers. The condition of the Courts of Chancery, rendered more unworkable than ever by late arrangements, and the hopeless point to which the strangely artificial technicalities of the common law courts have been brought, have reached the utmost limits of constitutional endurance. Let us save the law by protecting it from the continued artifices of those who have an ignorant interest in its superincumbent mystery. The conservative wants of society demand the effort.

And yet there is nothing so novel in all this reforming movement, and the New York Code is not the first evidence of lawyers educated under the Anglican system being mentally capable of questioning the soundness of its fundamental principle, and even of declaring their disbelief in it. While we

write there is lying before us a pamphlet written by Jeremy Bentham in 1808, in which many of the arguments now so successfully employed are enforced with all the satire of a keen nature. The pamphlet is entitled "*Scotch Reform, &c., &c., with Illustrations from English Non-reform.*" Speaking of technical procedure, Bentham declares "English judicature polluted with this vice to a degree altogether without example in the judicature of Scotland or of any other country upon earth." He scouts the notion that the forms of our common law courts provide against delay in trials. "What little abbreviation there is in the English mode," he says, "depends upon the *system of pleading* taken in a mass; and I have no more apprehension of seeing the Scotch nation defile itself with any such abomination than I have of seeing the port of Leith opened for the importation of a pack of mad dogs, or for a cargo of cotton impregnated *secundum artem* with the plague."

There is a stern antagonism between artifice and justice. The former speaks with the stammering lips of illusive contrivance—the latter is the real emanation of certain truth; and, therefore, it is that this reform should be undertaken in a spirit of comprehensive simplicity, which would instruct and regulate itself by the counsels of reason, learning and experience. Attended by these moral aids, we almost seem to be returning to the primitive period of English law, to be indoctrinated by Magna Charta itself with the legal science which "refuses to none, sells to none, delays to none right and justice." And the reflection is fraught with a wholesome power. It is profitable at times to revisit the fountains of the constitution, and to compare the pure element we find there with the system under which we live and act; to observe the gradual advance of the law; to examine well the labyrinthic recesses of human transactions into which it finds its way, and the mode in which its progressive development explicates the rule which it applies to the solution of difficulties—it is profitable, we say, to think of these things, and then to consider whether the form of law prevailing among us is the orthodox enlargement of its constitutional warrant; whether there is now a like puissance, comprehensiveness and justice; and thus whether the people of England have still secured to them the enlightened sentence which their jurisprudence in its original vitality affords.

The judicial means of such a sentence, we are told, are wanting—and they must be found. But why is it so? Why such a failure of justice? Let us look into Westminster Hall and inquire into its judicial appliances. We find in operation there two separate and distinct jurisdictions. The one called

the common law jurisdiction takes cognizance of that which is strictly LAW; the other, totally different in its forms, in its principles, and in its view of rights and of property, is called EQUITY, and administers the jurisdiction of chancery. Now when the *object* of this double organism is remembered, and that *justice*—legal justice, which is *one* thing, is to be the accomplishment of it all, it must at first sight strike the uninitiated mind as a singularly complicated method of attaining that which might be thought capable of being reached by a simple and direct process. The causes which produced this Janus-faced judicature add to the perplexity the mind naturally experiences in attempting to trace, comprehend and appreciate its peculiar system; showing, as is thus made clear, that it was from causes not only irrespective of the original principle of the law, but which perverted its administrative course, that this severed jurisdiction arose: for it was the work of development and not of express institution. The history is very curious, and by the violent anomalies and inconsistencies which were brought into perverse action by clerical rapacity, superstition, legal ingenuity, judicial narrow-mindedness and blunder, makes us acquainted with the unfair treatment Magna Charta received at the hands of the early professors of the law, while it prevents us feeling surprised that that great authority of English jurisprudence should at length stand out before us and demand to be reinstated in its ancient dignity.

Whatever may have been the remote beginning of that high judicial prerogative which is understood to reside in the Chancellor's office, and to whatever effect and in whatever form equitable considerations should regulate and control the administration of the law, we all know that it was the device of giving to property a twofold character, the *legal estate* and the *equitable interest*, which led to the perfect establishment of the severed jurisdiction. And here we are met by an influence which encounters us at every important point of our social history. It was the inventive genius of the *clerical body* which created this legal fancy, and thereby enabled them successfully to oppose themselves to the adverse stringency of legal enactment. Magna Charta only speaks of "right and justice," and originally there was but one superior court which administered law and equity together, and recognised only the legal estate, which was the primary and genuine form of property in land. Nor until the time of Edward III. do we discover the existence of any regularly organized system of juridical equity. Towards the close of that reign—(we beg our readers' pardon for thus bringing forward these elementary truths of our legal history



but they are necessary to our immediate purpose)—the clergy, in order to evade the Statutes of Mortmain, introduced from the civil law the notion of a *use* or right to the profits of land apart from the legal estate, which equitable right the Chancellor of the day, then always an ecclesiastic, took care to protect and enforce. And even the common law, which had always obstinately rejected the principles of the Roman law, indirectly allowed effect to a “*use*,” as an equitable interest, by refusing to interfere or take notice of the legal quality which the court of equity, by its views of justice, rendered valid. Conveyances and transactions completed in this form (a form be it observed which was in direct violation of the letter and even of the spirit of the *law*) therefore became subject to the exclusive jurisdiction of “*Equity*,” and the distinction between the legal and equitable right in land was thus established in the forensic administration of the country. Later on, politics followed in the wake of religion, and the doctrine of “*uses*” prevailed generally among all ranks and classes, “*by reason*,” as we are told by Chief Baron Gilbert, “*of the civil commotions between the houses of Lancaster and York, to secrete their possessions, and preserve them to their issue, notwithstanding attainders.*” This system continued till the sixteenth century, when, by a strange historical coincidence, we meet with Henry VIII., the enemy of the Pope, as a legal reformer, and very much in the position in which the Queen is at this day in relation to the courts of law. Another remarkable coincidence distinguishes this period; for it was about this time, or shortly before, that the old judicial system of Scotland was swept away, and a new institution, derived from France (the present Court of Session), established in its stead. And, to make the legal chronicles of the two countries still more strikingly coincident, an extensive reform of the Scotch courts lately took place, as we showed in a late number of the Magazine; and, in many other respects, the present condition of the English courts may be illustrated by the jurisprudence of Scotland.

We have the authority of Hume for the fact, that the Statute of Uses was the idea of the king himself. The historian says—

“The Commons, sensible that they had gained nothing by opposing the king’s will, when he formerly endeavoured to secure the profits of wardships and liveries, were now contented to frame a law *such as he dictated to them*. It was enacted, that the possession of land shall be adjudged to be in those who have the use of it, not in those to whom it is transferred in trust.”

How far Henry was influenced by personal and political motives in this legislative attack on the province of Equity, we



need not be curious here to inquire. It is sufficient to know that the condition of the Court of Chancery had become such that the legislature was imperatively called upon to remove from that jurisdiction the mischievous authority it had assumed, and, by depriving the Roman Catholic clergy of the power of fraudulent aggrandizement, to give something like a legal and direct currency to the transactions of society. Accordingly, in 1535 was passed the 27 Hen. 8, c. 10, commonly called the Statute of Uses, justly esteemed one of the greatest bulwarks of English law, by which the distinction between the legal and equitable qualities of property was declared to be abolished, and the equitable owner became, what he had always been substantially, the legal proprietor. The preamble of the statute certainly shows ample cause for its enactments. It is in these terms:—

“Where, by the common laws of this realm, lands, tenements and hereditaments be not devisable by testament, nor ought to be transferred from one to another, but by solemn livery and seisin, matter of record, writing sufficient made *bonâ fide*, without covin or fraud; yet nevertheless divers and sundry imaginations, subtle inventions and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by *fraudulent* feoffments, fines, recoveries, and other assurances *craftily made to secret uses, intents, and trusts*; and also by wills and testaments, sometime made by *nude parol* and words, sometime by signs and tokens, and sometime by writing, and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such time as they have scanty had any good memory or remembrance; at which times they, being provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscreetly and unadvisedly their lands and inheritances; by reason whereof, and by occasion of which *fraudulent* feoffments, fines, recoveries, and other like assurances to uses, confidences and trusts, divers and many heirs have been unjustly at sundry times disinherited, the lords have lost their wards, marriages, reliefs, harriots, escheats (&c.), and scanty any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions or executions for their rights, titles and duties; also men married have lost their tenancies by the curtesy, women their dowers, manifest perjuries by trial of such secret wills and uses have been committed; the king’s highness hath lost the profits and advantages of the lands of persons attainted, and of the lands craftily put in feoffments to the uses of aliens born, and also the profits of waste for a year and a day of lands of felons attainted, and the lords their escheats thereof; and many other inconveniences have happened, and daily do increase among the king’s subjects, to their great trouble and inquietness, and TO THE UTTER SUBVERSION OF THE ANCIENT COMMON LAWS OF THIS REALM.”

It is therefore enacted, "for the extirping and extinguishment of all subtle feoffments," &c., that persons possessing property under cover of a use or trust "shall from henceforth stand and be seised, deemed and adjudged in lawful seisin, estate and possession of and in the same," . . . "to all intents, constructions and purposes in the law, of and in such like estates as they had or shall have in use, trust or confidence of or in the same."

That is to say, that property was thereafter to be held on a *legal* and open title, and that those who possessed *sub rosa* should now do so in face of day. The monks were driven from the dark cloisters of Equity, and compelled to show themselves in the light of the common law, which itself, at the same time, was restored to its "ancient" rule. Equity had lent its authority to base purposes, and had become the handmaid of Popery. We will not however follow out this subject. We have no intention by this article of aiming a shaft at Dr. Wiseman, or the assumed venality either of his or of King Henry's ecclesiastical inspirations. The devious track of the law is that on which we are now bent; and we are quite willing to let it be imagined, that none other than jurisprudential reasons dictated the above preamble, and the statutory enactments which it so *gently* introduces.

Such, then, being the considerations which moved the legislature, the permanent improvement of the law, in some degree, might reasonably have been hoped for; but many years had not elapsed ere it was found that the anxious definitions of this statute, by which it was intended to purify the practice of Chancery and remove impediments in the way of justice, virtually defeated its purpose. "Uses" recovered their rule, became more metaphysical, difficult and artificial than ever. Other complications quickened into equitable life, and equity practitioners luxuriated in the triumph of their cunning mechanics. The effect of the whole has been the production of a systematic form of judicature, administering indeed an "equity" of its own, distinguished too by the deepest learning, the vigorous subtlety of the astute and burnished intellect, and (where it *can* be made effectually to speak) by a finely-tempered sense of justice; but which, by the tedium of its method, its delays and frightful expense, has failed in its great office; and we have but to mention these talismanic words—"THE COURT OF CHANCERY"—and the despair of the wearied, if not ruined litigant, rather than the plaudits of the seeker of justice, will be the miserable echo!

*Equity* then is not justice—but is law a more efficient agent? If Lord Truro by his equity cannot administer justice, can

Lord Campbell by his law? He cannot. The case of the courts of common law is even worse and involves greater absurdity than that of the courts of equity. The Chief Justice is a more helpless judge than the Lord Chancellor. The Chancellor, by his "injunction," can stay the cause of injustice in the Queen's Bench; but the latter is the slave of prescribed form, and is not permitted to consult its conscience. The Statute of Uses greatly enlarged the common law jurisdiction, and if at the same time the latter had been imbued with a spirit of liberality corresponding with the magnitude of the legal interests which were by the statute brought within its sphere, much of the inconvenience which has given occasion to this agitation for legal reform would not now have been experienced. The narrow, cramped, circumscribed forms of the common law remained, and the law could hardly be said to move freely within its ancient and peculiar precincts. It was not until the time of Queen Anne that a defendant was allowed to make his full and complete defence to an action; he, until then, was obliged to rely on one out of the several pleas he might have to urge; and even at the present day a plaintiff cannot reply to a defendant with all the matter at his command. He is still obliged to elect his reply. Why? Because to let him tell the whole truth would violate the law and frustrate the ends of justice? No. The omitted replies may be all good replies in law, and consistent with each other; but to allow them would be to interfere with that great necessity of justice the *singleness of the issue*! In other words, the case would not assume at the trial that neat and simple form which the understanding of the jury not less than the abstract logic of the procedure requires! The jury must not have too much to do; and it is better that the risk of injustice should be run than that *their* minds should be fatigued!—the *issue* must be *single*! But we are not yet done with the beauties of the common law. A plaintiff may have a just cause, clearly relevant, from the facts, to infer the demand he makes; but he has adopted a *wrong form of action*, and he is therefore walked out of court! Again, one of the parties may "demur" to his adversary's plea—that is, he may object to its legal sufficiency, and if the objection is disallowed, he is therefore and thereby held confessed to the fact, and judgment is forthwith given against him without any further argument or inquiry. To give another illustration. The solemnity of a trial may be set at nought, the time and attention of the judge and jury rendered useless, and the whole proceedings laughed at as a farce, because on a "motion in arrest of judgment" some early informality, having nothing whatever

to do with the merits of the case, is at the fifty-ninth minute of the eleventh hour discovered! And there are many other peculiarities of the law system equally ridiculous and unjust. Added to all which, the numerous fictions which meet us at its every turn, the fantastic performances of John Doe and Richard Roe, with the far-fetched technicality and false art in which the whole is shrouded, present to us a view of the common law which is well calculated to alarm our constitutional safety.

And yet it cannot be disputed that the logical design of the procedure at law is distinguished by a high degree of science. A finer idea of legal allegation cannot, we think, be conceived than the manner in which special pleading produces by its own working, by its intrinsic operation, the issue, the question which the parties are taken to accept as the matter for trial or argument. But the very refinement of special pleading is its defect. It is more suited for study, as a scheme of *abstractions*, than for the matter-of-fact business of life. The *issue* is not the *TRUTH*—the *form* comes short of the *legal principle*; and thus in fine we are forced to the conclusion that those venerated dignitaries, the judges of the land, do not, because by their form of procedure they cannot, administer the law of the land. The courts of common law cannot administer the common law!

We are the friends of prudence, legal and political; the advocates of all thoughtful reform—of all useful reform; and therefore we do not desire to follow out our deduction to the climax of indignation. Amidst all the short-comings of our legal administration we cannot help perceiving that the very faults of our practical jurisprudence may have proceeded from an overweening desire on the part of the judges to uphold the independence of the law and the liberty of the subject. Equity is now unworkable, because of its morbid anxiety to be just. Law is inefficient, because its sensitive regard for the freedom of the constitution has resulted in an artificial and impracticable technicality. There is therefore reason in this desire for legal reform. Meanwhile the legislature is prompted by the usual advice, and among the multitude of amateur counsellors there may be wisdom. While we write the popular press is busy with the theme, and the journals of the day are iterating their opinions with more or less of the authority of the fourth estate. Government commissions have been issued and are occupied with their deliberations. Voluntary law amendment societies proffer the fruit of their studies; and all are looking forward to the change that must inevitably come.

But of the various encouragements which have been offered to this law-regenerating movement, none have more engaged

attention than the account we have had of the remodelling that has actually been accomplished, and is in course of accomplishment, in some of the legal institutions of the United States, in which English law and its practice have hitherto prevailed. We are no admirers of American institutions, nor have we much sympathy with American opinions or American social tastes. But we are free to admit that the American lawyers are justly esteemed men of the highest professional merit. The coarseness of the republican nature is in the *jurisconsult* chastened and refined by the noblest of all learning. Their Storys, Kents, Greenleafs, and other brilliant ornaments of the American forum, have found few equals and no superiors in legal research. In a higher degree than can be affirmed of the jurists of England or of any other country where law is studied as a science, may it be said of the lawyers of the United States of America, that they have elevated themselves and their calling by the highest degree of intellectual enlightenment—by a learning not more varied than accurate, and by the most penetrating and pellucid discernment. Whether this is owing to the magnitude of their transactions, the peculiarity of their relation to other countries, involving the necessity of a practical acquaintance with different systems of law and government, or to other causes, certain it is that American jurists have distinguished themselves by a largeness of view and a pre-eminently scientific knowledge of jurisprudence, which entitles the deliberate conclusion of their counsels to the utmost deference. We were, therefore, not surprised to perceive the interest excited by this New York Coke, which, though it may shock the clockwork system of special pleaders and equity draughtsmen, will be found, by the candid and informed intellect, to have many of the traits of legal wisdom, sound sense and truth. Notwithstanding some blemishes and defects, we have risen from the perusal of it with a feeling of sincere admiration for the minds which have produced such an ably-digested resumé of practical justice. Like most specimens we have seen of American legal composition, the language employed by the learned commissioners is extremely well chosen: comprehensive, intelligible to any educated understanding—even popular—it is logically precise, severely grammatical, and most distinct. Yet, in the acutely felt anxiety of the commissioners to present, by their Code, a perfect system of pure justice, there is about the performance an affectation of extreme simplicity, and a pseudo-sympathy with the rough intelligence of “the people,” which may be successful make-believe with the artless, but which, to any one with an elementary knowledge of the practice of juris-

prudence, must appear very absurd. The commissioners themselves cannot forget they are lawyers; and accordingly a strictly professional and lawyerlike tone, which certainly should never be wanting to a juridical treatise, pervades the Code. There is, however, very much in it which would be unsuitable to the state of society in England. And, although we think the law commissions now sitting were wrong in declining to hear the evidence of Mr. Field (if such be really the fact), we are of opinion that none of the suggestions of the Code should be hastily taken up. The Americans themselves, we have reason to believe, are not at one on the subject, and the condition of things in this country forbids the unqualified adoption of any foreign method. The State of New York may delight in "Americanizing," as they say, the law of that continent; and, doubtless, from New York being the leading and powerful State, its lawyers and legislators will succeed in the endeavour. But in England neither the traditions nor genius of the people must be slighted; and if there is to be change, it must in all its qualities and relations be an *English* change.

Westminster Hall, however, which has borrowed so largely from the law of Scotland, might, with benefit, take many leaves from this sensible New York Code. More than one of its fundamental regulations have already found favour in England, and we only hope that, if their principles are adopted in this country, the intentions of our legislature will be as well and as clearly expressed. The Code of Civil Procedure is prefaced by a "Report to the Legislature of the State of New York," by Messrs. Arphaxed Loomis, David Graham, and David Dudley Field, the three gentlemen who were appointed commissioners to consider the subject. And we willingly bear our testimony to the legal judgment and apposite explanations by which their brief but expressive Report is characterized. It thus exhibits, in a single sentence, the nature and purposes of the Code.

"This Code is intended to embody the whole law of the State concerning judicial remedies in civil cases, and to supersede the third part of the Revised Statutes, a portion of the first and second, a large number of subsequent statutes, and all of the common law, on the subject of civil remedies."

The good sense of the commissioners appears in the following thoughtful paragraph:—

"It was a question with the commissioners of some embarrassment how far it was wise to go into details. There were two opposite difficulties to be avoided: on one hand was the danger, by provisions too general, of leaving a wide space for judicial discretion; on the other, equal danger, by going into minute details, of making the



practice inflexible and intricate, increasing the risks of mischance, and leaving unprovided for whatever particulars were unforeseen."

The truth of this last consideration, the miscarriage of the Statute of Uses, and the present relative state of the English Courts of Common Law and Chancery painfully attest. The commissioners go on to say on this topic—

"Whether they have succeeded in finding what they desired, a middle path between a judicial discretion too wide for safety on the one hand, and too narrow for convenience on the other, can only be known by the result."

With these general principles to guide them, the commissioners proceeded to frame the body of their Code, which they divide into four parts. The first relates to the courts, their judges and officers; the second embraces the subject of actions, "with all their incidents"—a most important and significant addition; the third treats of special proceedings; and the fourth is occupied with evidence. And under these divisions is prepared a system which we are told "is founded upon just and immutable principles. The learned gentlemen, however, would appear from the following observations (as we have already hinted) to be of rather sanguine temperaments.

"Heretofore the records of the courts have been sealed books to the mass of the people. Though concerned in them as suitors, and participating in them as jurors, they were repulsed by strange forms and technical language. If the law could have been administered with absolute certainty, without delay and without expense, yet if it had been unintelligible to them it would not have been satisfactory. (Here follows a highly imaginative and very American sentence, from which it is to be inferred that the American people, in respect of their "sovereignty" and "education," are quite a match for the lawyers.) . . . . "In aiming at directness and efficiency they have aimed also at diffusing a knowledge of legal proceedings; and there is they trust nothing in this Code, which any person of ordinary intelligence and education cannot understand."

The next sentence demonstrates rather the legal benefits society in New York is permitted intelligently to enjoy under this Code, than the humility of the codifiers themselves.

"And although the law of rights is a VAST SCIENCE, the accumulation of numerous countries and ages, which it requires study and patience to comprehend, yet it is believed that the practice of the courts is *here* set forth in *such* a manner, that no person need have occasion to witness a legal proceeding, read a pleading, or render a verdict, the meaning of which he does not comprehend." (!)

Such is the beautiful and true simplicity to which our worthy



commissioners have succeeded in reducing what they justly call a vast science! The people of New York are blessed indeed. Fancy an English shopkeeper getting critical on a special demurrer, conning nicely over a replication de injuriâ, or substituting logical casuistry for the ever-delightful and relevant "served him right!" We doubt, however—we very much doubt, whether even American intelligence will ever be able to realize the sanguine hopes of Mr. Field and his fellows. Nay, we doubt whether it is desirable that they should.

The next paragraph of the Report touches on a subject of supreme interest, of an agitating topic to many unfortunates; for it appeals to the most feeling part of a litigious community, the pocket. We mean "the expense of legal proceedings"—Costs! This is really the only painful part of the Code, and we earnestly entreat that the unhappy paragraph we have pointed out may be reconsidered. But we may observe that the diminution of this heart-breaking impost is ensured by the simplification of the Procedure, which at the same time, we are told, effectuates another important desideratum in litigation. "That certainty," say the New York Commissioners, "is promoted by the abolition of needless distinctions, the disuse of technical forms, and a free use in amending errors and defects, and dispatch by frequent courts, and the directness and simplicity of their operations, should seem to be unquestionable."

To talk of "disusing technical forms" altogether, in the administration of the law, seems to us absurd. But we think we know the meaning of the commissioners. The legal rules of justice are to be respected, but plain English is to be substituted for Latin and the circuities of fiction. On the subject of "frequent courts," the Report has some vigorous remarks on the means to be used in furthering the dispatch of business, the amount of which is to determine the number and endurance of the terms and circuits of the courts.

With these and other interesting explanations—not the least noticeable being that relating to the new "courts of conciliation"—the New York Commissioners open up the enacted provisions of their Code, which, under the classification of "chapters," "parts," "titles," "articles," and "sections," sets forth a system of judicial administration which we may affirm to be the boldest experiment in the legal elements of forensic jurisprudence that the adventure of intellectual revolution could have entered upon. The last link left of the chain which could associate American thought with the romantic induction of English history and tradition, has in New York been broken, and a new legal faith, new at least to *English* law, is professed. The spirit

of the change is well shown in the two following comprehensive sections of the "preliminary provisions."

"The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this State, respecting the subjects to which it relates; and its provisions and all proceedings under it, are to be liberally construed, with a view to promote its objects, and to assist the parties in obtaining justice."

Such is the broad and independent language of section 3. Section 7, which defines "an action," laughs to scorn the artistical nicety of Westminster Hall. It asserts that—

"An action is an ordinary proceeding in a court of justice, by which one party prosecutes another, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence."

Those only who are acquainted with the vast accumulated learning in the construction of statutes, the forms of action, suit, and prosecution, and the intricate technicality of special pleading—all of which has been called into existence by the exigencies peculiar to the machinery of the English courts—will be able to understand with what a fell swoop these two regulations displace the system which the Code has superseded.

But it is only against the particular law of *England* that this American standard of legal rebellion has been raised: although a judicial revolution it is not a wild or senseless innovation. Nor does it reject *all* that is to be found within the constitutional practice of our empire. In the judicature of *SCOTLAND*, that most peaceable, but least pretentious of countries, these New York jurists almost seem to have found their model. The identity of the two systems, especially since the recent statutory change in the administration of the Scotch courts, is very remarkable. Even in regard to matters of detail, the Lord Advocate and Mr. Dudley Field would really appear to have laid their heads together. In truth the discussion which the movement for all this legal reform has evoked, should be considered as a great testimony to the radical superiority of the Scotch law; and the Americans, in abandoning their former legal habits, may therefore be said simply to have transferred their allegiance from the jurisprudential lore of England to the legal genius of Scotland.

This just tribute to the lawyers of the latter country ought ere this to have been rendered. We have watched the agitation against the acknowledged abuses of the English courts from the beginning, and it has frequently struck us as a strange circum-

stance in the treatment of the subject by English lawyers, that while their proposed changes would in the great majority of instances be simply adoptions of old Scotch forms, the system whence the expected improvement is really derived is *never acknowledged*. Take, for example, what may be called the leading idea of those who are foremost in proclaiming their dislike to the existing state of the law in England, namely, the abolition of the distinction in procedure between law and equity. The absence of such a distinction has ever been the characteristic of the Scotch courts; and yet in the discussion of this subject in England, the name of Scotland or her legal system is never heard; but the union of the action of law and equity together is now treated as an American discovery! There is a general "ignoring" (to use a fashionable word) of Scotland and her intelligence in all the great topics and movements of the day, which is not less ungracious than unwarrantable. ENGLAND is GREAT BRITAIN, and the nonsense of Westminster Hall is magnified as the beautiful type of BRITISH justice? We cannot recall a more extraordinary instance of this exclusive—exclusive because oblivious, if not worse—Anglican feeling and prejudice, than the form which the consideration of impending legal change has lately assumed in this country. If there is any meaning in the arguments used and opinions expressed on, in the attention excited by Mr. Field's American innovation, in the existence of Chancery reform associations, in the voice of execration raised on all sides against the horrors of unjust equity and legal artifice, and in the loud demand for a pure law—if, we say, there is any meaning in all this, the effect of it must assuredly be to bring the forensic practice of England close to that of condemned Scotland, and without any approach or concession on the part of the latter. Yet Scotland is struck out of the imperial map, a cipher among the units of British interests, and of no account in national instruction or advice!

But the most serious disregard of the claims of Scotland is that evidenced by the legal competence with which those who are responsible for our forensic arrangements seem content should be the judicial quality of the House of Lords as a court of appeal; and contemplated changes in the administration of the Chancellor's office would appear to be not over-complimentary to the Scotch, who were the other day indebted to an incidental observation of Mr. Stuart Wortley in the House of Commons for the interest they had in any appointments which might affect the legal character of the House of Lords—nay, for their very legal existence, although three-fourths at least of the causes appealed to that supreme tribunal come

from Scotland! [How did it happen that Lord John Russell was made the dupe of such twaddling silliness as he displayed in his whole speech on this occasion?] It has hitherto been generally allowed by Scotch lawyers that the review by the Peers of the decisions of their courts "works well;" and unquestionably the number of appeals that come from Scotland shows no want of confidence, either on the part of the profession or litigants of that country, in the legal learning, judicial temper or fairness of the distinguished noblemen who assemble in their dignified Chamber to administer justice in the last resort. Their highest praise, indeed, is, that it is JUSTICE they are generally understood to administer. True it is that murmurs *are* occasionally heard in "the Parliament House" that a formal Anglican habit of mind has infused the taint of its prejudice into the induction of national principle, when external respect, rather than intellectual homage, is the chill and meagre reception accorded to the strange pronouncement. The legal idiosyncrasy of the Lords startles at times the candour of the north, and there are noble jurists whose performances not unfrequently attract its wondering gaze. The sincere thoughts of the hard-headed Scotch thus invade pre-eminent judicial authority, and the manner of their exacted deference would afford to illustrate the merry stories<sup>1</sup> of Westminster Hall. There are disparaging exceptions to the greatest examples, and the House of Lords, even in its most learned impersonation, has no immunity from the poor defection incident to all human accomplishment.

Be it, however, that a degree of accidental or intrinsic excellence has attended the judicial conduct of appeal causes from Scotland, no one surely will contend that the legal talent of the House of Lords is of such a character as the Scotch are entitled to require should belong to their final and conclusive judicatory. The condition of the peers in this behalf is a constitutional anomaly—a juridical solecism—professing itself equal, equal in the highest and most responsible sense of legal government, to duties, for the right discharge of which it offers no certain guarantee. That English lawyers—*English* lawyers, we say—and from education, profession, practice, prejudice and thought, lawyers in no other sense—should be deemed able at once to apprehend, much less to administer at all a foreign jurisprudence, seems an absurd if not an incongruous idea. But that English lawyers should be allowed to be appealed to by Scotch-

<sup>1</sup> We have heard, quoth our learned and jocose contemporary the *Law Review*, of a saying of a learned English judge respecting "*Lucas v. Nockells*," that he should only deem it applicable where the plaintiff was named Lucas and the defendant Nockells!

men and Scotch litigants from the decisions of Scotch judges, of men who have devoted their minds and their lives to the study of their own law, does seem, on the face of it, a most extravagant assumption. If, therefore, the House of Lords has not frequently or grievously miscarried in its legal ministry over Scotland, the fortunate truth is owing, we imagine, to the mental character and moral constitution of the men who have been invested with such ministry, and not to the system whence its authority was derived; and the fact cannot be concealed that lately the judicial development of the Lords presented a most able and interesting tribunal. There were Lord Lyndhurst, a distinguished and accomplished man, with a penetrating intellect and fine legal understanding; Lord Cottenham, a devoted Whig, but an admirable lawyer; Lord Brougham,<sup>1</sup> and Lord Campbell, a Scotchman of great professional acquirement as an English lawyer, and a felicitous illustration of the judicial character. These noble and learned lords acquitted themselves well of their difficult task; and even when they had the courage to "reverse," the reversal had generally the merit of being the intelligible deliverance of just minds.

But events have brought about a change. Lord Lyndhurst's voice may indeed still be heard, and with much of the power of former days, but his age and infirmities may prevent his resuming his duty as a law lord. Lord Cottenham cannot be relied on; he has been advanced to an earldom, and exchanged the bustle and fatigue of the Court of Chancery for the comfort and quiet of private life; and Lord Campbell has been promoted to the chiefship of the Queen's Bench. There remains Lord Brougham, who with Lord Truro now hears and determines writs of error and appeals from the courts of the three kingdoms, a most unrea-

<sup>1</sup> His Lordship's legal sallies are however sometimes peculiar, if not objectionable. We were amused a few days ago by a remark of his about the old Scotch book called the *Regiam Majestatem*, made in the course of the hearing of a Scotch appeal case, that of the Edinburgh and Glasgow Railway Company v. The Magistrates of Linlithgow. Mr. Hope, Q. C., towards the conclusion of his reply for the appellants, said that "the old laws of England and Scotland had been the same, and the *Regiam Majestatem* is believed to be the work of Glanville," when his Lordship is thus reported:—"Lord Brougham.—'Tis so, no doubt, and it can only be a little of the national vanity that would lead one now to dispute it." If this be correctly given his Lordship was more witty than ingenuous; for in his evidence before the late committee of the House of Commons on legal education, he declared, among other strange and unintelligible things about the Scotch, that the *Regiam Majestatem* had been taken from *Bracton*, a mistake on his part which we took the liberty to correct (see the *Law Magazine* for May, 1848, p. 178, on this point and the *Regiam Majestatem* generally). Lord Brougham now speaks differently and as if from his own knowledge. As to his other observation, we suggest to him that the Scotch cannot be considered "vain" of a work which with them has no authority.

sonable and most unsatisfactory if not an absolutely inefficient arrangement. Other arrangements it is indeed admitted must be made, and we hear of appointments and dignities which tempt the critic. But whether these will be such as to respect the rights of the Scotch people remains to be seen. If we are rightly informed the sensitive feeling of the Scotch will justly be excited by the neglect of them and their affairs, which the arrangements and appointments in question are understood to evidence. Although they have not, never had, and never wish to have an "O'Connell;" and although they detest anything in the form of mean political supplication, they may be allowed to hope that, in all important organization which is intended to affect the distribution to them of the behests of justice, the government and legislature will neither forget nor repudiate their existence. Lord Truro may be a tolerable English lawyer,<sup>1</sup> Lord Cranworth may be a learned man, and an upright English judge, and Baron Parke may be considered to possess the highest judicial ability; but in none of these learned personages, nor in their combination, can we see any adequate provision for the complete administration of the Scotch law. The people of Scotland, legal and lay, have a right to be heard on this question; and to demand that there shall be no minister of justice, or any other supreme judicial officer, in whose sound unbiassed intelligence of the principles and working of their system they cannot have confidence; and that the House of Lords, which derives its largest share of appeal business from their litigation, shall, by its legal elements, secure to them some better assurance of its judicial competence and fidelity than a knowledge of English "precedents," either in "law" or in "equity," can possibly afford.

Scotland might supply a legal peer as well as any of the English courts. The acquisition indeed of a Scotch legal mind to the forensic instrumentality of the highest court of appeal might be desirable on other grounds. It is plain that, if law reform be permitted to proceed to its accomplishment, according to the

<sup>1</sup> We recommend Lord Truro to study the technicality of the Scotch law, and avoid, if he can, the blunder he committed the other day in the use he made, during an argument by Mr. Bethel, of the Scotch technical term "ranking." Mr. Inglis of the Scotch bar, to whom Mr. Bethel was replying, had very properly and correctly employed this term. The Lord Chancellor however had failed to perceive its legal force, and he interposed thus, "I observe Scotch gentlemen always call it *ranking*—it's a *classification*." Really the Scotch bar are entitled to use the technicality of their own law. Lord Truro is quite wrong. "Ranking," or "ranked," or "to rank," is the proper, the peculiarly technical term in the Scotch system. There is no such a word in any Scotch law book as a "classing" or a "classification."



views and suggestions which have hitherto directed its course, a knowledge of jurisprudential modes other than those to be found within the precincts of Westminster, will be a necessary adjunct of legislative wisdom. We have said that change, if any, ought to be *English*: by which we mean, that English traditions, English associations, and English habits, should as far as possible be respected. But this conservatism might be satisfied, while at the same time English law might be liberalized, and have a more catholic quality imparted to its principle. To this end an accomplished legal scholar from the courts of Scotland might be a more efficient counsellor than an English jurist. With all that is excellent in these new conceptions of American genius, the Scotchman would bring the ideas of a legal administration which had been tempered by the venerated influences of our constitution; and his presence would be a protection against the impracticable fancies of unthinking republican innovation. One grand distinction between the fundamental characteristics of the two systems seems to mark the Scottish lawyer as a better instructor than his brother of England; and that relates to the homage paid by the former to the Roman law. The law of England is English law, and only English law: beyond the territory of England it is unintelligible. It is the custom of one particular country, and it wants a universal sentiment. But in Scotland the law is built upon the foundation of the jurisprudence of the world; of that magnificent system which has been justly called the common law of Europe. And to this day, where their own law is silent, the Scotch courts admit the direct authority of the Roman law, an acquaintance with the principles of which is therefore necessary to the barrister who would successfully practise in these courts. It is thus that the law of Scotland has a larger principle, a more comprehensive rule; and that its professors are more deeply imbued with the dogmas of legal science. And of this opinion is Lord Campbell, in whose judgment the Scotch lawyers are better acquainted with the general principles of jurisprudence than English barristers. Such, we say, is the recorded opinion of the Lord Chief Justice of England, as declared before the late committee of the House of Commons on legal education. The superiority of the intellectual jurisprudence acquired by the student of the Roman law is attested by another learned person, Professor Empson of Haileybury College, who was examined before the same committee, and who adduces the interesting historical fact that, in the conferences on the Code Napoleon, it was observed that the most clever men came from the south of France, the country of the civil law, and not from the north, the *pays coutumier*.



And it must ever be so where principle addresses the understanding, and unreflecting custom and arbitrary form, derived from antiquated convenience, are not allowed to influence the mind.

It is, therefore not less the interest of those who would improve the law of England, than it would be but just to Scotland, that they should not affect to disregard or "ignore" the jurisprudence of that ancient kingdom. We say so, generally. But when we remember how largely the legal administration of England has already borrowed from the Scotch system,—for every important legal change for the last twenty years could be shown to have been taken from the old Scotch books,—and when now we see the remedies and reforms by which we are told to believe the Courts would be purged of abuse—remedies and reforms which in many respects are approximations to, and in not a few instances simple adoptions of Scotch methods; when, we say, all this is considered, the jurists of Scotland seem to be entitled to some deference. Not that we advocate every particular of the Edinburgh forum, which, notwithstanding the recent statute, still contains within its machinery many erroneous and awkward contrivances; and the Scotch might in turn ameliorate their legal condition by transferring to the forms of the Court of Session several admirable rules that are to be found in the practice of the English courts of law and of equity; rules which, without retarding judicial dispatch, enforce that exactness of statement and strictness of procedure which the severity of justice so clearly demands. The Scotch practice is undoubtedly too loose, and Scotch lawyers have somewhat of the unsatisfactory character of legal latitudinarians. But they are well instructed in legal principle, and the excellence of their views on the distribution of remedial law seems to be at last admitted.

But on the niceties or refinements of practical jurisprudence we do not feel ourselves called upon, in these pages, to dogmatize. Nor are we ambitious of dictating to the legislature the particulars of any reform, much less a reform that proposes to deal with the application to the affairs of life of the greatest of mental sciences. We trust that, when the Commissioners now sitting have fulfilled their duty, and the results of their inquiries are laid before parliament, the subject will be deliberated upon in a spirit becoming its dignity and importance, that the voice of the platform declaimer, of the delusive theorist, will be hushed, that incompetence will stand by, and that the demagogue will try to be diffident. We trust it may be so: and that, in a wise deference to the experience of the thoughtful states-

man, and to professional learning, the people of England may find they have the best security against the vulgar pretensions of ignorant men.

We are unwilling then to be officious meddlers. But, without transgressing our proper limits, we may anticipate that the question of law reform, with the constitutional interests that are bound up in it, will be considered under these three heads:—1st. The expediency of maintaining or discontinuing the distinction between law and equity; 2nd. The subject of technicality; and, 3rd, The trial of the fact, whether by jury or otherwise.

On the first of these heads our thoughts revert to the Statute of Uses, and its unforeseen effect in adding to the subtleties of equity, instead of narrowing its province and thereby enlarging the jurisdiction of the common law. This latter suggestion, that of enlarging the field of the common law, has always appeared to us to be of much more consequence, and as likely to be attended with more advantage in the administration of justice, than adding to the judicial staff of the Court of Chancery. The restoration to the common law of its ancient rule, without perhaps entirely abolishing the judicial authority of the occupant of the woolsack, would, we venture to think, have been sounder legal policy than appointing supplementary Vice-Chancellors; and litigants would be better off than they are now with increased powers to Lord Campbell, than with the equitable government of Lord Truro. Ignore, not the good sense of the Scotch law, but the malignant fallacies of a Junius, and let the judicial mantle of LORD MANSFIELD, despite the bigoted reclamation of common law black letter, rest again on the shoulders of the Chief Justice of England. Let, in brief, the common law show a CHIEF JUSTICE! and restrain, by rendering unnecessary, the omnipotent INJUNCTION.

The language of legislation should be guarded in this behalf. For why have previous attempts in England failed, and why did the Statute of Uses miscarry? Because it was too minute; because it defined too much, and too easily let in the exception. We have spoken of the dates of contemporaneous history, and shown that, while Henry VIII. was trying to reform the law by despoiling the monasteries, the Scotch, under James V., were engaged with the responsibilities of a legal change, which was in truth a revolution. The Statute of Uses was passed in 1535. In 1532 the form of the new Scotch Court was declared; confirmed by the Pope in 1537, and ratified by the Scotch parliament in 1540. What a strange coincidence, and yet antithesis of facts! In both countries there was an almost simultaneous reform of the law. But in England the king and parliament,

disgusted with the clerical ingenuity which had rendered the Statutes of Mortmain abortive, directed the face of the new law against the Church; while in Scotland the benediction of the holy see was specially invoked; Rome lifted her apostolic hands to render the blessing, and law was laid at the feet of religion! The English statute, by its verbose spite, gave new birth to the trickery of equity; but the Scotch, who owing to their poverty never had anything to fear from the evasion of the law of mortmain, were content with providing in simple language for the direct administration of justice. The act of 1532, declaring the institution of the College of Justice, or Court of Session, bears in the preamble,

“Item anent the secund artikle, concerning the ordour of justice, because our Soverane is maist desyrous to have ane permanent ordour of justice for the universale wele of all his lieges, and tharfor tends to institute ane college of cūning and wise men, baith of spiritual and temporale estate, for the doing and administracioun of justice in *ALL civil actions*, and tharfor thinks to be chosen certane persones maist convenient and qualifit tharfor, to the nowmer of xiii persons, half spiritual half temporal, with ane Presedent: The quhilk persons sall be auctorizat in this present Parliament to sitt and decyde upon *ALL actiouns civile*,” &c.

The Scotch judges of the day, differing from the English common law judges of the same period, held that they were not entitled to apply any casuistry to the divisible elements of jurisprudence, but that under the above act they were bound to make every consideration of which they might judicially take cognizance conducive to the ends of justice, and that therefore equity and law together must proceed before them in one form of suit. And accordingly, although there is in the Scotch law a clear distinction in principle between law and equity, there never has been, and is not to this day, anything in the practice of the Court of Session to favour the notion of the severed jurisdiction.

That the Scotch are here right we need not now argue. The common law of England has been sufficiently long venerated as an abstraction, and something more substantial and tangible is demanded. How far the cry of justice may invade the domain of equity remains to be seen. If the New York Code be followed, the Court of Chancery will be treated according to the dictates of common sense and engulfed in law. In explaining the jurisdiction of their supreme court, the American commissioners employ language from which it would almost appear that they had the above old Scotch statute before them. At page 28, § 41, they say, “Its (i. e. the supreme courts) original jurisdiction extends to *all civil actions* and special proceedings, of

which exclusive jurisdiction is not conferred upon another court or officer by the constitution or by this code." And in the commentary following they explain, that "to ascertain what the precise jurisdiction is, it is necessary to recur to the jurisdiction of the Courts of Queen's Bench, Common Pleas and Exchequer in England, on the common law side, and to that of the Court of Chancery in that country on the equity side, and to collate with them the various modifications which the constitution and statutes of this state have introduced." The code, therefore, proceeds to enact, that the supreme court shall have jurisdiction in "*all suits and proceedings now undetermined . . . . in the late supreme court and Court of Chancery, and in the late Courts of Common Pleas.*" We are afterwards told, p. 269, "Indeed it may now be considered an inevitable tendency of the times, to obliterate the distinction between legal and equitable forms, and to administer law and equity in one tribunal and one action. Even in England, the country where the resistance to innovation is strongest, there appears to be indications of a movement in that direction."

The total abolition of the courts of equity may be undesirable. For even where the law exists in the purest form, making the nearest possible approach to justice, there may occasionally be cases for the relief of an *extraordinary remedy*, such as the Court of Chancery, in its theory, undoubtedly professes to give. But its present jurisdiction we believe not to be less mischievous than absurd, and it must submit to be shorn of its unfair proportions. Moreover, there remains a very serious question, namely, whether the overgrown jurisdiction and accumulated powers of the Chancellor do not allow too much to the prerogative of the Crown, and therefore whether his is not an unconstitutional authority? The Chancellor is an officer, in his judicial capacity, personal to the Crown; and to make the Crown through him alike the dispenser and interpreter of justice, were to make it override the law itself. And therefore the demand for its purification is not only an expedient endeavour, but an act of constitutional duty. It is idle to say that the Roman law admitted the severed jurisdiction. That system recognized principles of allegiance which the law of England repudiates, and under which the almost legislative pretensions of the Chancellor might have found favour. *Quod principi placuit habet vigorem legis* was their doctrine, but no Englishman would dare to uphold such extreme monarchy. And yet even the Prætor did not presume to erect a power which was to be above the law; but, acknowledging the distinction in principle between law and equity, gave effect to the two elements of property and rights

by one form of administration. If the courts of equity are to be maintained as independent judicatories, let them administer nothing but what the most liberal construction of the common law excludes.

The subject of *technicality* enters largely into the general consideration of judicature. Very mistaken views appear to be entertained respecting its important character. From these views we cannot too strongly express our dissent. To abolish it altogether and reduce the language of forensic allegation and judicial determination to a level with the comparatively feeble diction of popular communication, would surely be not less injurious to the interests of true investigation, than that such unhappy vulgarity of opinion would degrade the dignified nature of jurisprudence. The artificial technicality of the common law, however, with its senseless fictions and oblique contrivances, we cannot defend. They outrage reason, offend truth, and divert the even course of the law. But that all technicality is therefore bad, would be a fallacious conclusion. A certain kind of technicality, that genuine technicality which is the clear utterance of the law itself, is an absolute necessity of justice; and no enlightened form of procedure can ever want it. In this sense the language of Scotch pleading is not sufficiently technical; it is vague, without certainty or precision: and hence the loose ideas generally of the Scotch lawyers. The New York reformers would have us believe that they have put an end to technicality, but an attentive perusal of their own admirably expressed code is enough to satisfy themselves how largely they have found it necessary to employ the language in which they received their own legal knowledge.<sup>1</sup> Technicality is necessary to the impartial administration of the law; it is necessary to the liberty of the people and to the equal protection of all rights. It speaks in terms that are known and definite, and proclaims with the changeless meaning of its one voice, that in the stern eye of the law there is no distinction between peer and peasant, but that as suitors in a court of justice both must speak the same language.

Trial of the fact, whether by jury or by other forms, will doubtless engage a large share of the coming discussion. We approve of juries as tribunals for legal inquiry. But while we are sensible of the benefits to be derived from the institution, we cannot but feel contempt for the romantic twaddle, which, with unquestioning faith, finds its text in the presumed inspiration of the so called palladium of liberty. Its operation should be put on a

<sup>1</sup> See in particular title VI. of the Code, p. 262, which treats "of the Pleadings in Civil Actions," the whole of which we cannot too strongly recommend to English lawyers. The chapter on "the Demurrer" is most admirable and clear.

footing of probable utility which would be compatible with reason and common sense, and legislative provision should be made for a higher standard of intelligence and character than is generally found in the judicial or personal qualifications of those, who, by a fiction that not unfrequently involves the temporary degradation of the public, are understood to represent the "country." Romance should be sacrificed to substantial use, and no one allowed to enter the jury box whose antecedents do not offer a reasonable assurance that he will understand what he is about when there, and have the courage of an honest man to do his duty. Blackstone's teaching of jury law has long since been exploded, if indeed his extravagance was ever accredited by rational minds as just exposition. His inflated periods are refuted by experience, and the dull-pated English juror is a sorry illustration of his praise. De Lolme is equally absurd when he magnifies the juror, in criminal cases, into an infallible, irresponsible being. Of late years in England there have been pregnant indications that the trial by jury does not now hold that high place in national estimation it used to occupy. The disregard of evidence, of the law as laid down by the court, of the plain truth of the case, and the returning a verdict of mere prejudice and feeling, are all circumstances painfully expressive of the degeneracy of the jury system as a useful institution. In Scotland juries in civil causes have never been popular. The costliness of the trial, and the awkward manner in which the legal appliances of the pleading require the parties to join issue, have combined in producing results so unsatisfactory that no inconsiderable proportion of the community in that country have long desired to suppress the institution altogether. But convinced, justly as we think, of the excellence of the jury tribunal, the recent Scotch statute tries to improve its working, by the enactment of several important reforms in the preparation of the cause and the conduct of the trial. These may be thus briefly summed up: the merits of the case, and not the mere form of the suit, are to regulate the trial;—facilities are given for joining issue, and for the appointment of the judge who is to preside;—the litigants may, if they choose, have the fact tried before the judge without a jury;—and a more convenient and less expensive mode of proceeding than has hitherto prevailed, is directed, with a view of obtaining a new trial: finally, an extraordinary jury of *arbiters* to consist of three, five, or other odd numbers, and to have extraordinary powers, may upon the joint reference of the parties investigate the case and give a verdict which is not to be reversible on the evidence. In the New York Code regulations similar with these will be found—so strangely identical are the legal systems of Scotland and of that American state. In the New York Code however,



there is a judicial peculiarity which must have the effect of withdrawing from the cognizance of juries very many controversies that would otherwise come before them, while the benignity of the *friendly* jurisdiction (for such it is) must surely have a salutary influence on the community. We allude to the Courts of Conciliation, by means of which we are told "many of the actions now brought for slander, assault, and others of a like kind, may be avoided, and, by extending the inducements to a compromise during a litigation, actions commenced may often be settled before a trial." The proceedings are to be before a superior judge, who is to use his influence in bringing the parties to an amicable settlement. There is the same provision in the civil procedure of France, where in one year no less than 726,556 cases were settled by conciliation. Lord Brougham attempted to introduce this jurisdiction into the County Court, but has failed.

Some change in the administration of the law by juries would appear to be called for in this country. The disfavour with which this administration is regarded in England is undoubted, and theoretical liberty is, in the minds of many among us, opposed to substantial justice. If Lord John Russell, amidst all his present cares and troubles, can remember everything he wrote in his celebrated Essay on the History of the English Government and Constitution, he may be able to recall a passage in which he asserts, that "the veneration which the English have for trial by jury, *like the admiration they entertain for Shakspeare (!)*, must be taken as a practical proof of its excellence." (See the Essay, 2nd edition, p. 125.) The sentiment, however, has an awkward significance at the present day, for we fear juries are now little "venerated," and many would rather lose them than Shakspeare. The business of the County Courts supplies striking evidence of this feeling: for it has been ascertained as a singular manifestation of the unpopularity of juries, that, in these courts, out of 226,403 cases in which either party might have demanded a jury, there were only 802 in which it was thought desirable to require the assistance of that species of tribunal; in other words a jury was only appealed to in three or four cases out of every thousand tried! There is something more in this state of things than discontent with the administration of the jury system: there is a want of confidence in the principle of the institution itself, which we deeply regret. Legislation on the subject will therefore be difficult. But believing, as we sincerely do, in the radical soundness of the principle of trial by jury, we trust that the efforts of Parliament to purify its practice will be successful, and that this ancient form of trial may, by periodical improvement, be ever preserved to the English people.

To these thoughts we would add a reflection that must occur



to the minds of all earnest legal reformers: **LEGAL EDUCATION** must be advanced, and the enlightenment of jurisprudential lore be made ancillary to the amendment of the law. Without this all hope of any lasting advantage from legal reform will be vain. Such reform must necessarily be the mere groundwork of that which the well instructed and scientific mind alone can quicken into a great system; and without therefore some better provision for the training of the legal intellect than the Inns of Court have hitherto been able to put within the reach of candidates for the Bar, all legislative attempts must fail. The condition of the English Bar in this respect is most extraordinary, most unaccountable. That a man, before the eyes of the world and with the deliberate sanction of his country, should be solemnly invested with the office of a jurisconsult, and be allowed to assume the garb of the most learned and subtle of all professions, without a knowledge of the simplest elements of jurisprudence, nay without possibly having ever opened a law book, does seem a most indefensible anomaly. It is indeed an anomaly that should make the English barrister a more humble man than he is sometimes found to be. Both in its cause and its personal and professional effect it is a scandal to the law. In 1846 a committee of the House of Commons was appointed to inquire into the subject, and in due time they presented a Report, which, among much trash and absurdity (with, we may add, statements grossly unjust to the Scotch Bar), contains some valuable information. Professor Empson's evidence is deserving of especial notice. He says,

“With an improved education and enlarged reading our law books would be improved too; our lawyers would become more disposed and more competent to reform the law. The best American books on law seem to me to have more range and substance in them, which I partly attribute to the more extensive reading of the American lawyers from French and German books. If you look at the translations by the Americans from foreign jurists they are much more numerous than the English. *The civil law is more studied. The consequence is such men as KENT and STORY. I think, unless something is done more quickly than has been done in England hitherto, that the great advance in improvement of the English law will be effected in America rather than in England.*”

The whole of Mr. Empson's evidence is most interesting and valuable.

Mr. Bethel, Q.C. is also examined by the Committee, and thus speaks,—

“I think I may venture without presumption to say, that any individual taking up a volume of our modern Reports, and observing the manner in which cases are argued, will not detect in them any

evidence of any great extent of reading, of any large acquaintance with the principles of the science of law, any familiarity with the works of foreign and ancient jurists, which are deemed in all other countries to constitute the basis, and the primordia of legal education; he will observe in argument a mere habit of calling upon the memory for the citation of what are more or less apt instances of adjudication of similar points found in the Reports; and in truth the argument is most frequently a mere task of memory, rather than the enumeration and application of legal principles."

The Committee accordingly reported, that while so many volumes of Reports issue from the press annually, "there is a remarkable deficiency in that higher class of scientific works, in those systematic developments of the history and philosophy of the law (a phrase Mr. Bethel says he dislikes but which he employs for want of a better), which, arising from broader and deeper studies, also tend to render still broader and deeper its practice and administration, and of which we see so many distinguished evidences from the press not only of the Continent but of America."

We must now bring our observations to a close. We have declared our opinions fearlessly and sincerely. Our purpose is the single one to do good; and we may be permitted to hope that we have adduced considerations which will weigh with those who may be charged with the mission of reform. There are prejudiced persons who may regard us as unreasonable legal critics, and some may think us mere utilitarians who would ruthlessly remove ancient landmarks. We would feel the reproach. A "landmark" touches the associations of the mind, and a regretful romance may come over us when contemplating its disturbance. But what after all are we in quest of? That which justice says should be ours. Yet we must not hope for too much. There are expressions and words which convey in themselves more simply and significantly than paraphrase can their own magnificent meaning; which rise up in the mind at once with all the truth and power of language in its greatest elevation,—and when we speak of JUSTICE, we conceive something which is above all material arrangement, something beyond the limits of human organization, of a principle that it is not within the capacity of man to satisfy. We can then only hope for a measure of its grace in our institutions, and so to mould their form as most largely to attract its supreme influence.

R. S.

[We have inserted this article because we are anxious to do even *too much* "justice to Scotland;" feeling that she has had but a scanty measure heretofore. We need hardly add, that we do not assent to all our Contributor has said on the subject.—EDITOR.]

## ART. III.—A MURDER TRIAL IN AMERICA.

Report of the Case of John White Webster, for the Murder of George Parkman.

By George Bemis, Esq., one of the Counsel in the Case. Little and Brown, Boston, U. S. 1850.

**I**F the Civil Code and the practice in the United States be worthy of respectful consideration, its criminal proceedings seem to afford us both positive and negative examples no less deserving of our attention.

It has always appeared to us that, in most countries, a very undue standard of importance, as regards criminal cases, obtains in the public mind; determined far less by the difficulty of the cases themselves, and the manner in which they affect public interests, than by the attraction they present to a morbid appetite for excitement in the depraved and idle portion of the community, who are accustomed to batten on the grosser details of dramatic horrors. This standard of excitement is always heightened by the rank of the parties who figure in the case. Until a higher taste be cultivated among us, and the masses of the people become less vulgar minded than they are, it is perhaps hopeless to expect an improvement on the part of the public in this matter. But we demur very strongly to the manner in which the courts minister to it. It is totally inconsistent with the spirit of our jurisprudence to magnify and prolong trials in proportion or indeed with the slightest reference to the rank of the parties who figure in them, or even to the horror of the incidents. We should have imagined a year ago that such a standard of importance was still more alien to American jurisprudence than to our own; and that the stern simplicity of republican judgment would have been mirrored in its courts of justice, and have animated and moulded the conduct of its bar. The recent trial of Dr. Webster for murder in the Supreme Court of Massachusetts, is a signal proof that the Americans err more widely than ourselves in the same evil direction.

We made a promise to notice the book in which this trial is very ably reported<sup>1</sup> in our last number, and we now redeem it. The book contains the whole trial, which, as we stated before, occupied *twelve days*, and the report of it, printed in the same sized type as this article, occupies 593 much larger pages!

<sup>1</sup> By George Bemis, Esq. Little and Brown, Boston.

The mode of proceeding, or rather the order of proceedings, and latitude for speeches, differ from ours, and give far greater scope for prolixity and needless amplification. This is the programme: First comes the indictment, not unlike our own forms, containing four counts, of which the three first particularise the mode of death, and the fourth, rendering the others wholly superfluous, stating it generally, and describing it to have been effected by "some means, &c., to the jurors unknown." The arraignment takes place before a single judge, and plea recorded. The trial is then appointed to take place more than a month later, when the court consists of three or more of the justices of the supreme judicial court: as is requisite in all capital trials, according to the statutes of Massachusetts. In this case C. J. Shaw and Justices Wilde, Davey and Metcalfe presided. The counsel for the commonwealth were the Hon. John H. Clifford, Attorney-General, and John Bemis, Esq., and for the prisoner the Hon. Pliny Merrick and Edward D. Sohier, Esq.

The attorney-general then rises, and in a little speech informs the court that the grand jury (an incumbrance the Americans have not had sense to rid themselves of yet) have found an indictment against the prisoner, John Webster, for the murder of George Parkman; that the prisoner and his counsel are now in court, with other information equally valuable; and concluding with a formal motion that "a jury be empanelled to try the issue."

Next comes another little speech from one of the judges to the prisoner, informing him of his right of challenging twenty jurors peremptorily, and as many more as he has good cause for challenging. After more of this child's play, we find a peculiarity which is well worth our respectful consideration in England; namely, an inquiry of each juror, first, whether he had expressed such an opinion, or was sensible of any bias in the cause which would interfere with a candid judgment on it, and thus affect his impartiality. The second juror in this trial was set aside because he had. Secondly, according to the 6th sect. 137th ch. of the revised Statutes, "No person whose opinions are such as to preclude him from finding any defendant guilty of an offence punishable with death, shall be allowed or compelled to serve as a juror, on the trial of any indictment for such an offence." On this ground the ninth juror demurred to be sworn. After the disgraceful acquittals for plainly-proved murders so frequent of late in this country, owing to the same morbid feeling, it would be very expedient to test our own jurymen similarly. A good deal of time now lost, and justice de-

feated, might be averted were our jury-boxes equally well weeded.

The jury being at length completed, the attorney-general moves the court, in another little speech, that Mr. Bemis may be permitted to aid him as associate counsel. Now, seeing that there were 116 witnesses examined and cross-examined in the trial, it might have been supposed that the "Commonwealth" would have afforded its attorney-general the assistance of a junior, without the necessity of his applying to the court for it. We should presume this is scarcely an instance of the administrative economy so highly lauded by the panegyrists of American institutions. These preliminaries over, the attorney-general opened the case in a speech which occupies twenty-one pages, and which it must be admitted contains a very full, dispassionate, and lucid statement of the case against the prisoner. A case much more divested of doubt, difficulty or intricacy we have seldom read or heard of; or one which less justified the enormous redundancy of matter with which it was belaboured.

We will recapitulate the facts, and endeavour to include every point which had any legitimate weight in determining the guilt or innocence of the prisoner; in other words, all that was any-wise relevant to the issue.

Dr. Webster, the prisoner, a professor of note at the Medical College of Boston, had borrowed sundry sums of Dr. Parkman, the murdered man, for which he held mortgage notes from Webster for two thousand odd dollars, secured likewise on his furniture and minerals. Dr. Parkman pressed for payment, and finding that Dr. Webster had deceived him, having pledged his minerals to one creditor, and given lecture fees which he had promised Dr. Parkman to another, he became indignant, accused Dr. Webster of dishonesty, and insisted on the discharge of his debt, and threatened him with a trustee process and legal proceedings, and on the Monday before the murder, which took place on Friday the 23rd of November, he declared to him that "to-morrow something must be done." On this Dr. Webster made very minute inquiries of the janitor respecting the vaults below, and the disposition of the walls and their accessibility. Further demands were made during that week, and on the morning of the murder Dr. Webster called on Dr. Parkman, and made an appointment with him to call on Dr. Webster that day at the Medical College, at half-past one o'clock, to receive payment. The same morning Dr. Webster received ninety dollars from the clerk who held his ticket fees, and he then told the clerk that "he had settled with Dr. Parkman." He then paid this money

into his own Bank. At a quarter before two o'clock Dr. Parkman is seen going along the street which leads to the Medical College, and is met going up the stairs. He never returns home, nor is he ever seen *alive* afterwards.

Dr. Webster's rooms at the medical college consisted of a back room or upper laboratory, opening out of the lecture room, on the second story; out of this, on the left hand, was his private room, and to the right a staircase leading down to Dr. Webster's laboratory, on the upper basement floor, immediately below the rooms above mentioned. Here were two furnaces, and in the right-hand corner, close to the foot of the stairs, a privy, of which Dr. Webster had exclusive possession; beneath the privy and on the basement floor was the privy vault, enclosed in thick walls, through a grating in which on the outside the sea flowed.

Dr. Webster admitted that Dr. Parkman called on him at about half past one o'clock on the day in question, for his money, according to appointment; that he paid Dr. Parkman 483 dollars of the debt due to him, which he had accumulated by means of small savings for a length of time; and that Dr. Parkman gave him the mortgage notes, caught up the money, and with it carelessly exposed to view, rushed hastily out of the room.

This statement Dr. Webster made to various persons, and that he left the college and went home by the omnibus at three o'clock the same afternoon: but it was proved that he was at the college as late as nearly six o'clock. It was also shown that he stayed at the College at unusual hours, and that his rooms were constantly kept locked, even when he was in them, for several days after that of Dr. Parkman's disappearance, so that the janitor was unable to get access to them for the purpose of cleaning them. This was contrary to the usual practice. During this time the assay furnace, which had not been used for a long time previously, was found to be kindled and heated in so great a degree, that there was some fear for the safety of the building. Water was heard running constantly, which he had previously objected to let run. Dr. Parkman's disappearance caused the utmost anxiety to his friends, for he was a person of peculiarly punctual habits: and whilst every one sympathised in their distress, Dr. Webster's manner, when he met them, was abrupt and free from any expression of sorrow or sympathy when conversing on the subject of Dr. Parkman's disappearance. Although advertisements were inserted in the papers, one of which Dr. Webster took in, for the purpose of his discovery as early as the next day, Saturday, Dr. Webster



did not communicate the interview he had had with Dr. Parkman to his family till Sunday afternoon at four o'clock.

Several anonymous letters in disguised handwriting were posted to the city marshal, some purporting to be from the murderers or plunderers of the missing man, but all tending to direct the search of the police to different quarters, remote from the medical college. These were proved to contain strong affinities to the handwriting of Dr. Webster. Two of them were daubed with some instrument of a softer nature than a pen or stick; and a "cotton pen," which would have made similar appearances, was discovered in Dr. Webster's possession, and Dr. Webster himself, in many cases, circulated reports tending to direct suspicion to other quarters.

Unavailing searches were made at the college, though not with any great strictness in Dr. Webster's apartments. At one of these, when the police officers were going into his back private room, Dr. Webster said "that is where I keep my valuable and dangerous articles." They therefore made no search there. He also withdrew their attention from the privy.

At length suspicions of Dr. Webster's own guilt were conceived by Littlefield, the janitor, who accordingly confirmed them by watching and listening at Dr. Webster's door, when he was bolted in. Having obtained leave from one of the professors, he resolved to break a hole, unknown to Dr. Webster, into the privy vault, through the thick wall in the lower basement or cellar floor, satisfied that if Dr. Webster were guilty, some remains of his victim would be there. After great labour he succeeded in breaking a hole through, and there he found a pelvis, the right thigh, the left leg of a human body, also some towels, which had been on the Friday morning in the laboratory belonging to Dr. Webster. On the next day were found, in a tea chest in Dr. Webster's laboratory, covered with tan, the thorax and left thigh of a human body, and in the assay furnace were found, partly calcined and imbedded in the slag and cinders, a number of bits of human bones, and certain blocks of mineral teeth. It was proved over and over again that the bones corresponded precisely with the height and very peculiar conformation of Dr. Parkman's body, whilst the dentist who made it swore to the mineral block of teeth, and jaw, as being Dr. Parkman's. Stains were found on the stairs caused by acids best adapted to efface the characteristic appearances of blood. String was bound round one of the thighs, which formed part of a ball in Dr. Webster's exclusive possession.

Dr. Webster was thereupon apprehended and brought to the medical college, and he became so powerfully agitated that



he could not stand without support. When he was shown the portions of the body, he said they were no more Dr. Parkman's than his own. When asked for the key of the privy he gave a wrong one. He also wrote home to his daughter, telling her to tell her mother on no account to open a packet he had entrusted to her, which when opened was found to contain the mortgage notes held by Dr. Parkman. They had the word "paid" written across them, which was shown to be in Dr. Webster's handwriting! Neither was the sum said by him to have been paid to Dr. Parkman, the amount to which, with the interest, the principal then due amounted. Moreover, the acquittance covered a note not due and not even said to be paid. It was also discovered that on the morning of his arrest, Dr. Webster had ordered a tin case of large dimensions and peculiar strength, so made that he could solder it on himself.

We believe we have now mentioned every item of material evidence brought forward against the prisoner, and all that the chief justice submitted to the jury. A clearer or simpler case of murder, more capable of being amply proved in a dozen hours, could scarcely be conceived. The inquiries about the vaults, the placing of the sledge hammer in the laboratory, its removal and disappearance afterwards, and the invitation of Dr. Parkman to the spot, on a plea of paying him when there was no proof that the means existed of doing so, and much proof that there were none—sufficiently showed the design to murder, and removed the case at once, if these facts were believed, from the possible construction of manslaughter; afterwards alleged by the prisoner to have been the case. What was the defence? Virtually none—if we except the forlorn hope of an alibi, not of the prisoner, but of the murdered man, set up in the teeth of his mangled but clearly identified body in the apartments of Dr. Webster. He was seen by five people after the time he went into the medical college, on the fatal Friday, in the streets.

So far for facts. We now proceed to capitulate the proceedings. On the conclusion of the opening speech by the attorney-general, a motion is made for a view of the locus in quo, which was assented to, if found necessary. The witnesses are then ordered out of court on both sides. (Where the 116 were stowed away we are not informed.) The examination of witnesses for the prosecution then began, on the Tuesday morning, March 19th, and concluded on Wednesday afternoon, March 27th, thus occupying seven mortal days!! We apprehend that, considering the simplicity and comparative fewness of the facts really material to the issue, there is no parallel to this monstrous folly on record. At half past three o'clock on that day, the junior

counsel for the prisoner, Mr. Sohier, commenced his address, and we give the following extract from it, as a fair specimen of the line of defence taken, and of the style and character of forensic eloquence in America.

THE OPENING.

*" May it please Your Honors,  
and, Gentlemen of the Jury :—*

" I am aware, that it is usual—that it may perhaps be considered imperative upon counsel, in a cause like this—to call the attention of the jury, to the situation of their client; and to comment, in strong and nervous language, upon the importance, the vast importance, of the interests which that client has at stake. But I shall not do it :—I cannot do it.

" I fear much, Gentlemen, that were I to permit my attention to wander from the cause to the party, from the record to the dock, I might be lost. I might see nothing, but the man,—who, for more than a quarter of a century, has been a respected professor in that University, which is the pride of our State, and a respected lecturer in that college, which is one of the boasts of our city;—the man, under whose instruction numbers now present (myself among the rest) were educated;—whose memory, whose very form and features, are associated with many pleasant recollections;—I might see nothing but him—struggling for his life, struggling to avert infamy from himself and from his children—in that same dock, where we have been accustomed to see felon after felon abide the judgment of the law. I might think of these things, gentlemen, and I might forget the case.

" I must, therefore, rather follow—though it needs must be at a long and humble distance—in the footsteps of the learned and eloquent counsel, who has addressed you on behalf of the Government, and call your attention to our duties; to our relative situations and relative responsibilities; to the cause; the rules of law, applicable to the charges involved in it, and the rules of evidence, applicable to its long details of circumstantial testimony.

" We are here, as he has told you, in the discharge of our various duties, as officers and ministers of the law, to discuss and determine the *one* great question, which, for months, has absorbed the attention and agitated to their very lowest depths the feelings of a great community: to wit. Is the life of Professor Webster forfeited? Is it forfeited to the laws of his country, because it has been proved here, beyond all reasonable doubt, that he has committed one of the most horrible of offences which can be found enumerated even on the law's dark catalogue of crime?

" A serious duty is this, which has devolved upon all of us; upon you, who are his judges; upon us, who are his counsel, and who represent him in this more than mortal struggle.

" Upon you it devolves to say, whether Professor Webster shall go hence to his family, and there remain—what he has ever been to them—the very centre of their purest and holiest affections—the very

object of their idolatry:—or, whether he shall go hence to the scaffold, leaving to that family a name which, if they could, they would bury in the grave with him; a name to be ever deemed by them their great though their only disgrace. Yes, gentlemen, it devolves upon you to say, whether the fire upon his hearth-stone shall henceforth burn brightly, and its light be shed on happy faces, beaming kindly upon his; or whether your breath, Mr. Foreman, when you pronounce the verdict, shall extinguish that fire, scattering its ashes to the winds, and causing its very place to be forgotten—in kindness by friends, in mercy even by enemies. This duty devolves upon you, and under the responsibility of your oaths. If you err, you see the victim. He, it is, and his is the family, who must be offered up as a sacrifice to that error, unless, indeed, you err on mercy's side;—on the side of that quality wherein it is permitted man to approach nearer, than in any other, to the nature of his God. There you may err, and err in safety; and no prisoner's groan, no widow's sob, no orphan's tear, bear witness to your error. Herein, and herein only, is your lot happier than ours. If *we* err, we must answer it to the prisoner and his friends, to an exacting and scrutinizing profession, and to our consciences."

After several pages in which the fundamental distinctions between murder and manslaughter are elaborated, Mr. Sohler dilated on the uncertainty of circumstantial evidence, and then detailed two points on which the defence was to be based, thus:—

"First, then, to show that he is not the person to commit an act of this kind, we shall prove his character and reputation.

"The law, Gentlemen, I am frank to say to you, does not give great weight to character, where direct evidence is brought to bear upon a party. But when a man stands charged, on circumstantial evidence, and in a doubtful case, with the commission of a great crime, the greatest possible weight is given to character. And his character is always admissible with this view.

"If it should be proved, by direct evidence, that a man had committed murder, it would be of little importance to prove that he had previously been of good character. The only use that could be made of his character, in such a case, would be to show that the witnesses who swore against him did not tell the truth. The argument would be, it is incredible that a man of such a character could commit such an offence. But when you come to a doubtful case,—a case of circumstantial evidence,—then weight is to be given to character; and a man has a right to be judged of by his fellow citizens by the character which he has earned and established by a long life.

"Now, in introducing character, a man is only at liberty to introduce it so far as his traits of character have a direct bearing upon the offence charged. For instance, suppose a man should be indicted for larceny. It would be perfectly ridiculous to show that his character for humanity was good. His character for honesty would be

in issue. Suppose a man were indicted for perjury. His character for truth and veracity would be at stake, not his reputation as a man of peace.

"Professor Webster is charged with having committed a violent, a malicious, a cruel act. We will lay before you proof of his character in these respects:—that he is a man of peace, the least qualified of all men to do a deed of violence;—that he is kind and affectionate, with a disposition far removed from malice;—that he is humane; eminently so: no one can reproach him with a cruel act. These are the traits of his character which we are permitted to prove, under the present issue; and we shall make use of that permission.

"Second, we shall introduce proof, Gentlemen, in regard to the question, whether Dr. Parkman was ever out of the college after that Friday noon. For we are mistaken if there is not positive proof to show that he did come out of it. This may not be decisive as to whether the body found is his or not; but it will be decisive as to whether he was destroyed by Professor Webster, as is alleged by the Government.

"Third, we shall present to you, so far as proof is accessible to us, the entire history of Professor Webster's conduct, from Friday, the 23rd of November, up to the night of his arrest; from which it will appear, that his demeanour, his words, and his deeds, were all those of an innocent man; and from which also, if I mistake not, you will be satisfied, that very little, if any reliance, is to be placed on the testimony of Littlefield.

"It is not necessary that I should go into the details of the facts which are to be proved under these several heads. It is sufficient for me to say, that, under the first, it will appear that Professor Webster is a person of a mild and amiable disposition; remarkable even for kindness to all about him: his temperament is nervous; and, like all nervous men, though occasionally petulant, he has never been known to be violent, but is in truth a man of constitutional timidity. He has always been ardently attached to his profession as a chemist; and to it he has devoted his days and his nights. Whatever advancement he may have made in that profession, whatever accumulated knowledge he may have gained in it as a man of science, still, with reference to his dealings with the world, he has always remained anything but a man of shrewdness. On the contrary, he may be considered quite the reverse. That at least is his character, so far as we know it.

"In the pursuit of his favourite science, we shall show that it is no new thing for him, to be locked up in his laboratory; that it is no new thing for him to exclude the janitor or anybody else from his rooms, when conducting his experiments. Such has been his constant practice; and it is a safe and necessary practice in all laboratories. True it is, that for a short time after the introduction of the Cochituate water into the College, he permitted Littlefield's family to take water from the pipes in his laboratory, for the purpose of keeping them free from corrosion; but for very good reasons—(finding that his labora-

tory had been used for improper purposes,)—he stopped that use, locked his doors, and permitted the water to waste through the sink-spout. This is really the head and front of his offending:—from the fact that his doors were locked; from the fact that the janitor, and some others, could not readily gain admission; and from the fact, that the water was heard running in his apartments during his absence, it has been attempted to fasten upon him a train of suspicions, which jeopardize his character and his life.

“Under the second and third heads, we shall freely admit that the interview took place, as alleged, between one and two o’clock, on the 23rd of November; but shall distinctly prove that Dr. Parkman left the College precisely as Professor Webster has stated; that he was seen almost immediately after he left it, and subsequently, during the afternoon of that day, in various parts of the city, by highly respectable individuals, to whom his person was as well known as it was to any of the Government’s witnesses. And this is all that is known by us or by any one else concerning him.

“Professor Webster himself left the College at an early hour that afternoon; sufficiently early to be at his house in Cambridge at his usual tea-hour, which was six o’clock. He took tea with his family, and then he and his wife accompanied their daughters to the house of a neighbour, where the daughters were engaged to meet a party of young people. Here the Professor and his wife left the young ladies, and went themselves to the house of another friend, at which they spent the evening. From thence they returned home, and remained up until their daughters came in, which was about one o’clock, when all the family retired at the same time.

“We shall also show you how Professor Webster passed the rest of that week, up to the moment of his arrest: that every morning he breakfasted at home, at an early hour; that his forenoons were spent in his laboratory, as was his wont: that he dined at Cambridge with his family every day; and spent his afternoons and evenings in their company.

“These are the circumstances which we intend to prove; and in addition we shall offer proof on various points directly contrary to the testimony which the Government have put in.

“This, Gentlemen of the Jury, is all the opening statement which I deem it necessary to make; and I shall now proceed to introduce the evidence to support it.”

This speech occupied only two hours and a-half.

Then came the evidence for the prisoner, which began late on Wednesday evening, the 27th March, and ended on the following evening. It consisted chiefly of witnesses to character, and to the fact of Dr. Parkman being seen in the streets by five or six persons after he was seen to go into the college. This being the sole point which threw the slightest doubt on the case or required any peculiar consideration, we shall confine our extracts

to the manner in which this point was treated by the counsel and the judges.

Next followed what is termed rebutting evidence for the government, which was short and immaterial. The counsel for the government applied for leave to show that there was some one very strongly resembling Dr. Parkman in Boston at the time; but this was refused as inadmissible and too remote from the issue by the learned judges. It seems to us to have been not so much so as some other evidence they gave, and which frequently consisted of conversations between the witnesses and third parties when the prisoner was not present. It is obvious that the rules of evidence are very lax in the American courts, and much of the redundant matter introduced into this trial so arose. It might be supposed that the case would have ended with brief speeches on the new evidence. So far otherwise the leading counsel for the prisoner now begins his defence.

The Hon. Pliny Merrick thus treats the alibi.

“ Upon our proposition, if we can maintain it, we stand securely against the whole body of evidence which the government have put into the case. It repels the possibility of the conclusion from any and from all the facts, in support of which any proof has been adduced, that Dr. Parkman lost his life by the hand of Dr. Webster. If he once left the college alive after their interview, he is living still, or he has died a natural death, or fallen by other hands than those of the prisoner at the bar; for there is nowhere to be found the slightest proof to warrant even a suggestion that they met again, if they parted from each other upon the conclusion of the business which brought Dr. Parkman to the Medical College. .

“ I do not by any means intend to assert, or to imply by these observations, that the vast mass of circumstantial evidence now produced by the Government has no tendency to support the accusation made against the prisoner. I am quite ready to admit that such is its tendency—otherwise it would be wholly irrelevant and inadmissible; the grand inquest could have made no presentment—no indictment would have been found, and no trial could have been had. The question is not whether the evidence has a tendency, but whether it is sufficient to establish the fact beyond all reasonable doubt. It must produce irresistible conviction upon your minds, or the prisoner is entitled to an acquittal. ”

“ But the proposition which I distinctly assert is, that the separation of the parties at the close of their interview is incompatible with the conclusion attempted to be deduced from the circumstances which have been proved, that Dr. Webster is guilty of causing or occasioning the death of Dr. Parkman. No matter that this great fact of their separation will not enable you to account for all subsequent appearances. The means of explanation may not be possessed, however certain you may be that Dr. Webster did not commit and could



not have committed the homicide. Suppose you are satisfied of the fact of their separation—that Dr. Parkman withdrew from the college, and was seen walking, during several successive hours in the afternoon of the day, in different streets of the city—then say, if you please, that you are also satisfied that the mutilated parts of the human body found in the vault, the tea-chest and the furnace, were the remains of the body of Dr. Parkman—suppose, still further, that the proofs should be deemed conclusive that he came to his death by the hand of violence—and then add to all these various assumptions the consideration that you cannot explain how the body came to be found where it was discovered without assuming also that Dr. Webster was guilty of the homicide—is his guilt a necessary conclusion from these premises? By no means. All this may be true, and yet all may be consistent with his innocence. You may be sure that he could not have been guilty of the criminal act of the destruction of the life of Dr. Parkman, because you know that they parted in life, and you know also that there is no evidence that they ever met in life again. There is a mystery, beyond which you cannot solve. It is not needful that you should do so. Nor is there any ground of claim upon the prisoner that he should attempt to account for what is as inexplicable to him as it is to you. He has gone far enough when he has exhibited to you proof which wholly disconnects him from any possible scene of violence, and which is utterly incompatible with the supposition of his guilt. You will not hold him to supply you with impossible explanations. When you find that the separation of the parties makes it impossible that he could have perpetrated the atrocious crime which is imputed to him, you will not hold him responsible for those surrounding facts, for the existence of which neither he nor you can furnish any satisfactory solution. It is enough that no effort, however earnest or zealous or persevering, can find out their cause; they may be allowed to belong to that great class of the inscrutable facts of human life, which baffle the power of human reason, and defy the most intense efforts of human investigation.

“Nor is there anything extraordinary in this; it is but the renewed manifestation of a truth verified by all individual experience. It has been wisely said that truth is stranger than fiction. The imagination cannot keep pace with the actual events of life. There are mysteries in the order of Providence, in the circumstances of our condition, and in the ordinary course of our lives, which no intelligence we possess can adequately explain. They lie deeper down in the depths of our being than human reason can fathom—where its profoundest exertions can never sound.

“Then let me call your attention to the proofs that these parties did in fact separate from each other after their interview on the 23rd of November. And if it can be made clearly to appear that, while the prisoner at the bar remained within, Dr. Parkman went out from the Medical College—then, though his remains were subsequently found mutilated and dishonoured beneath its foundations, his death can be attributed to no act or violence of Dr. Webster; and however much



there may be in the evidence to excite suspicion, there is nothing in it which can justify his conviction.

“ We have produced several witnesses, all resident in this vicinity, to testify to you on this subject. The defendant has enjoyed no favourable opportunity to increase the amount of such evidence if it exists. Himself confined in prison, he could hope for no aid from his family—from his wife and daughters—in inquiries which might result in the discovery of other persons who did see Dr. Parkman during the afternoon of the day he visited the Medical College. Yet, though the number of witnesses whom we have been able to produce is not large, even in this respect, our proof does not stand in a disadvantageous contrast with that of the government, which traces the course of Dr. Parkman during the morning; for with all the search that has been made by the aid of his family, the police and the whole official force of the city, the number of their witnesses upon this point is but little above our own; while there can be said to be no advantage on their side, either in distinctness of recollection, or the means of identification.

“ We have submitted to you the testimony of Mr. Thompson, Mr. Wentworth, Mr. Cleland, Mrs. and Miss Roades and Mrs. Greenough. We have also called Mrs. Hatch. I shall not now dwell upon her testimony. Hereafter I shall have occasion to revert to it, and shall then endeavour to show you that it is of most material value and importance; and, connected as the fact she states is with circumstances testified of by others, it will deserve your careful consideration.

“ Mr. Thompson says that he came into Boston, from Cambridge, on the afternoon of Friday, the 23rd of November; and that at twenty minutes after two o'clock he met Dr. Parkman in Causeway Street. He is enabled to fix the day by the circumstance that he came into Boston to deliver to the person for whom the service was rendered a memorandum of an examination he had made in the Registry of Deeds for the county of Middlesex into the title to a certain parcel of real estate. He did deliver it, and at the same time gave a receipt for his services, which bears date the 23rd day of November; and that day was the only time, for a week before or a week after, when Mr. Thompson was in the city. He left Cambridge at near two o'clock, observing the hour of his leaving, as it was indicated by two public clocks in that place; and soon after he met Dr. Parkman he had occasion also to refer for the time to his own watch. Thus he most definitely fixed the day and the hour of the day of their meeting in Causeway Street; and this time was so long after Dr. Parkman undoubtedly entered the Medical College, that it is certain that he must have left it, if he was actually seen by Mr. Thompson.

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“ Mr. Wentworth, a gentleman well known in this city, and whose personal appearance upon the stand certainly entitles him to your most favourable consideration, testifies, that in the afternoon of this same Friday, between the hours of half-after two and half-after three, he met Dr. Parkman in Court, at the head of Sudbury Street; that they were coming towards each other from opposite directions; that just

before they met, the witness crossed to the opposite side of the street, and at that moment took notice of Dr. Parkman, and of his peculiar manner, as if he were looking over the tops of the buildings; all which he particularly described to you. He was himself walking with Mr. Russell, whose attention he drew by some observation to the appearance of Dr. Parkman. He states the circumstances by which he recollects with accuracy the time of this occurrence—the most material of which is what occurred between himself and his wife, when he returned to his home in the evening of the following day. She told him that two men had been there inquiring for Dr. George Parkman, who was missing from the city; to which he replied, that he thought he could not be far away, as he saw him in Court Street the afternoon preceding. Mr. Wentworth, moreover, states other facts, which you will remember, of his going to Haymarket Square and to Quincy Market on particular business; which cannot but convince you that he is not mistaken in his recollection or in his statements of the day, or of the hour of the day, when he met Dr. Parkman.

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“ I come next to the testimony of Mr. Cleland, of Chelsea, a gentleman of intelligence, and of most respectable position in society. On the morning of Friday, the 23rd of November, as a member and one of the officers of a religious society in that town, he came to this city to make arrangements to secure the services of a clergyman at his church on the ensuing Sabbath. Not having succeeded in his object during the morning, he went in the afternoon to call upon the Rev. Mr. Wildes, in Franklin Street. He returned through Washington street; and he testifies that on his return, between the head of Franklin and Milk Streets, he met Dr. Parkman, at a time which could vary but little, if at all, from twenty minutes after three o'clock. He saw him under circumstances which particularly attracted his attention. He appeared to be walking with a labouring man, in his common working-dress; and Mr. Cleland says that the contrast immediately occurred to his mind,—Here is Dr. Parkman, a man of wealth and affluence and high personal position in society, walking in the street with a labouring man in his working garb. He thought it was peculiar, and therefore kept watch of him; and he did not take his eyes from him from the time when he first noticed him, at a distance of four or five rods, until they passed each other. He noticed, in the meantime, that Dr. Parkman was not walking with the labouring man as he at first supposed, but that they separated soon after he began to take notice of them.

“ Of the accuracy of Mr. Cleland in all these statements there seems to be no possible room to entertain a doubt. He had known Dr. Parkman for many years; and his observation of him upon this occasion was distinct and particular. Of the time and the place there can be no question. The day is fixed by the occasion which required the visit of Mr. Cleland to Franklin Street; it is made certain by the note which he that morning wrote to one friend, and by the note which he received from another, both of which bear this date, and both of which

had relation to the business which made it necessary for him to see Mr. Wildes that day, and both of which are produced by the witness to fortify his recollection on the one side, or to test it on the other, if the government chooses to submit them to you for your inspection. The time, the place, the hour and the person, are made as certain as such events can be, by the testimony of an upright, intelligent and disinterested witness. Who will presume, in the absence of all contradiction or of rebutting proof, to affirm, at the hazard of life, that he has fallen into error or mistake? Can you conscientiously reject this testimony, which you cannot certainly know is not true, upon the mere surmise and conjecture that he may have fallen into error upon a question of personal identity?

“There is, still further, the testimony of Mrs. Rhoades and her daughter. They both testify that they met Dr. Parkman in Green Street about five o'clock in the afternoon. They make the day certain when this occurred by the occasion of their absence from home. They had been at Hovey's, and purchased a dress for the daughter; the sale-books at Hovey's confirm them as to the time of the purchase; and as this was the only occasion when the mother and daughter passed home through Green Street together, the only question which can possibly be made is as to the identity of the person whom they met. They had both known Dr. Parkman perfectly well. Mrs. Rhoades had been upon terms of some intimacy with his family for years, and they were accustomed to salute each other as they passed in the street. They did so upon this occasion; and these respectable ladies entertain now no doubt of the fact that they then saw and passed Dr. Parkman. Mrs. Rhoades has been especially anxious and cautious and vigilant upon this subject. She has not been insensible that her friends of the Parkman family have supposed that she had fallen into some mistake, and she has tested the accuracy of her memory by the utmost power of reflection. The result is a clear confirmation of her conviction that she cannot be mistaken. And thus you have the most conscientious testimony of a woman of more than common intelligence, of unblemished reputation and unsuspected character—sustained, if not corroborated also, by the recollections of her daughter—that Dr. Parkman was in Green Street many hours after that at which he had entered the Medical College. Do you know that it was not so?

“Another most respectable witness, Mrs. Greenough, of Cambridge, testifies that on the same day, at ten minutes before three o'clock in the afternoon, she met, as she believes, Dr. Parkman in Cambridge Street.”

The main defence having been thus based on an alibi which, if true, wholly exculpated the prisoner, in the second day of his speech Mr. Merrick adopted a line of defence utterly inconsistent with it, and put it to the jury that he might have been guilty of manslaughter on sudden provocation. Perilous as this double defence always is, it was thus powerfully put:—

“It is impossible to know how men will conduct themselves under

the domination of passion, in its highest excitement; in the very moment which succeeds to the consummation of some event of overwhelming magnitude. We should hope, and perhaps even we should expect, that, if parties like these came to combat, and the combat went on until it was closed by death, the survivor of the fatal struggle, still in the heat of blood, would have rushed from the place of combat, and exclaimed to the first person whom he met, 'God have mercy upon me! I have killed my friend! From angry words we came to blows; fuel was added to the flame; and in the heat of passion I smote him to the earth.' I say, we might have hoped that it would have been so; but who can be sure that it would? Professor Webster occupied an important position—was a man of good standing in society. He had a wife and daughters dependent upon his professional labours and ability; he was poor; and all before him might look like ruin and desolation. While his blood was hot and his passion high, and his victim just slain, suppose that he commits one rash act more? There, surrounded as he was by walls which excluded the presence of all witnesses, and shut out all human observation, the temptation might come upon him to conceal; and the mutilation of the body would mark the first act in the process of concealment. From that moment all disclosure was too late. The accepted time of salvation, by an open, public disclosure and confession, was past; and all that ensued was but the necessary consequence of the first false step, taken after his brother ceased to be a living man. If the temptation of concealment unfortunately triumphed, all the rest followed as a natural, perhaps as an inevitable consequence. The attempt to avert suspicion—to shut out proofs—to turn away inquiry—would all succeed in the train of events, but as mere matters of course. It will account for the locking of the doors—the false statements respecting the interview, and might prompt even the writing of the anonymous letters, to blind the police, or avert their eyes from the region of the Medical College. It will, to a considerable degree, account also for that general composure, even though it were interrupted, in some few instances, by an observable agitation, which, as you have learned from the testimony, characterized the demeanour of the prisoner down to the day of his arrest.

“Wrong we may admit all these subsequent actions, artifices, evasions, and devices to have been. But they were the natural, though deplorable fruit of that first impulsive and ill-judged movement, which attempted to throw over a fatal event the darkness of an impenetrable concealment. But it is because they are its consequences, and not its cause, that all these subsequent acts must be rejected from your consideration, when you come to characterize the original act of criminality.

“Review then, with the care which it deserves, the testimony and the evidence, in all its parts, and in its various aspects. See the relation in which these parties stood to each other—the pursuing and the pursued. How natural, that it should finally prompt to mutual resistance—that combat should follow—that, in the suddenness of passion

and in the heat of blood, life should be lost! And, if it must be, against the protestations and denials of the prisoner at the bar, that you shall feel yourselves constrained by the evidence to determine that he was guilty of any homicide, I appeal to you if all these probabilities—all the just inferences from every surrounding circumstance—do not show clearly and satisfactorily to any reasonable mind, that the crime could not have been premeditated murder, but must have been extenuated by heat of blood, upon sudden combat, into that still great, though less dreadful, crime of manslaughter.”

We wish we had space for much longer extracts from this very able speech, which occupied six hours and a half in the delivery, a period by no means unduly protracted after the mass of evidence with which the government had encumbered the case. Then came a concluding speech from the attorney-general on the whole case. He annihilated every vestige of the defence. Although this might have been done in an hour—so entirely had the evidence for the prisoner broken down—we find him again dilating on the value of circumstantial evidence, and speaking nearly *six hours*. According to the written statement of one of the jury (who obligingly details in the newspapers what occurred on their retiring) they had ceased to have any doubt as to their verdict, the moment the evidence for the defence closed, as indeed they well might. He met the alibi by dilating on the frequency of mistakes of identity, as well as endeavouring to show, which he however failed in doing, that the witnesses had not sufficient certainty of the facts as to time and person. The evidence was as conclusive, plain and positive as nine-tenths of any we have witnessed during a long experience in courts. The attorney-general said—

“If we satisfy your minds that Dr. Parkman’s remains were found in that furnace, in that vault, and in that tea-chest, then that fact is just as much to be taken into consideration, to be weighed against this testimony to prove that he was seen after he entered the Medical College, as this testimony of the *alibi* is against the fact of those being his remains, or the fact that he never left that building alive. And I undertake to say, that all this testimony, if it were in reference to an ordinary case of *alibi*, where the party was still living, the testimony of six witnesses, who swear that they passed the person in the street, did no business with him, did not speak with him—that there was a person with him at the time, who does not come forward—would be extremely unsatisfactory. If Dr. George Parkman were living, and in this court-house to-day, trying an action against Dr. Webster for having stolen his notes of hand, and the only defence were founded upon this testimony of an *alibi*, I should maintain with confidence to a jury, that the evidence was, in itself, too weak and insufficient to support it.

"But what was Dr. George Parkman doing on that day when these witnesses think they saw him? Roaming about the streets: now in Cambridge Street, then in Causeway Street; now in Washington Street, going towards Roxbury; then in Court Street, examining the roofs of houses; again in Cambridge Street, and afterwards in Green Street. What was he doing? Was there ever anything so preposterous?

"Consider this fact:—I believe the city authorities have made a computation of the number of persons that pass through Court Street in a certain given time, during a business-day. I do not remember the number, though I think I have heard that it is thirty thousand—thirty-thousand persons, in a day of twelve hours. How many persons were there in the city who did not know Dr. George Parkman? There was probably no citizen of Boston more extensively known to its inhabitants.

"Now, if Dr. Parkman were roaming about this city, as these witnesses describe, during the whole of that Friday afternoon, I ask you to say, upon your consciences, would it not have been possible to have produced here to swear to the fact, not six, or sixty, or six hundred, even;—six thousand rather? Do you suppose that he could have wandered about this city during a whole afternoon, and no human being, except these six persons, see him? Well, what is the evidence? Why, that this great number of persons, who, if he had been in the streets, must have seen him, *did not* see him! This is shown by the search which followed immediately;—a search of the greatest possible extent, vigilance and scrutiny.

"But it is not merely the passing a person on the opposite side of the street, or on the same side of the street, or having a casual glance at him, that can give us a well-grounded assurance that we are not mistaken in this matter of identity, if we attach any weight to experience. We offered to put in evidence here, that there were persons who accosted a man, believing him to be Dr. George Parkman, and found they were mistaken when they approached to converse with him. We were not allowed to put it in. And why? Because, as the Court said, it was a matter of common experience. And I put to you, that it is a matter of common experience"—[Not so. They said it was "too remote."] We dissent wholly from their ruling, however. It excluded very important means of testing the value of material evidence.]—"common to you and to me. I ask you, how many times you have gone up to a person and spoken to him, or even attempted to take him by the hand, and then retreated with—'I beg your pardon, sir; I thought it was Mr. ———.'"

"You may have seen my friend, Mr. Train, the district attorney of the neighbouring county of Middlesex, by my side, during one day of this trial. In the last capital trial I conducted with him in that county I met upon the side walk, near the Leverett-street Jail, on my way to East Cambridge, on the first morning of the trial, a police-officer of this city. As I passed him he said to me, 'Mr. Train, good morning.' I stopped, having this very matter of the disappearance of Dr. Park-



man in my mind, and turned towards him. He asked, 'At what time shall I bring over the subpoenas?' 'In what case?' I inquired. 'The Pearson case,' said he. 'Oh, at any time in the forenoon,' I responded, and passed on.

"On my arrival at the court-room, I mentioned the circumstance to Mr. Train, and, at my suggestion, he met the officer with a reproach when he came with the subpoenas, for not bringing them sooner. 'Why,' said the officer, 'you told me I could bring them any time this forenoon.' 'I told you?—when?' 'Why, this morning, when you were coming over.' 'I have not seen you to-day,' replied Mr. Train. 'Why, certainly, I met you, and talked with you.' 'You met me?' 'Certainly, I did.' So confident was he of the identity, that he was ready to have gone up on the stand and sworn that he actually talked with Mr. Train; and when I told him that I was the person, and told him precisely what the conversation was, for a long time he honestly believed that we were playing a hoax upon him. Yet, Gentlemen, the degree of resemblance between Mr. Train and myself is no greater than is found between many persons here present, and between Dr. Parkman and many persons now living."

This falls short of a satisfactory explanation of the distinct affirmations of not one but five independent witnesses, who all swore to meeting a man who is described as well known by them, and of most peculiar shape and gait, and having a most extraordinary chin besides. He is also described by one of the witnesses as looking *up to the roofs of his own houses*, an exceedingly unlikely thing for any one else to have done. As the counsel for the prisoner well said, if it be extraordinary that no more than these few witnesses in crowded streets should have seen Dr. Parkman after he went into the college,—how comes it that all those whom the inquiries of his family, and the diligence of the police, could discover to have seen him pass through the streets *before* he went in, should be no more in number? He was avowedly there then. The fact is, that the mere meeting a man, one is in the habit of seeing frequently in the same town, makes no impression whatever on the mind, and hundreds of people every day meet people they know well by sight, and retain no kind of recollection that they have done so the next day, or even an hour afterwards. We almost wonder the attorney-general did not resort to the reported appearance of persons immediately after their sudden death, now so frequently asserted,<sup>1</sup> as an explanation. Assuredly he gave none one whit more satisfactory; nor, many will think, so much so. Feeble as this part of the argument was, the Attorney-General most ably and successfully demolished the hypotheses one after

<sup>1</sup> Three of these reputed appearances have been related to us lately by persons of veracity.



the other; viz. that previous character was a sufficient defence—that some unknown agent committed the crime (pointed at Littlefield)—that the conduct of the prisoner was natural, usual, and inconsistent with guilt. The whole of the speeches were clever; parts of them powerful and eloquent, without one vestige of that rhetorical gewgaw and stage device which but too often alloy the best efforts of our Bar. The peroration of the attorney-general is a proof of this, and affords an admirable example of a much-needed lesson to juries, which our judges might with great benefit give in this country.

“It was the remark, Gentlemen, of a great English statesman, that the object of all good government was to obtain a good jury. If in any government this is true, it is especially so in ours, which is ‘a government of laws, and not of men.’ The Constitution of this Commonwealth, as I have already remarked to you, has for its first and highest object the protection of life; the security of human life against the violence of passionate, and the machinations of wicked men. And, Gentlemen, shall it fail of this its high purpose?

“If you undertake to exercise the prerogative of mercy,—a prerogative which is assigned by that Constitution to another tribunal,—how can you be sure, Gentlemen, what mercy is? I very much doubt in fact whether the murders which have so thickened upon us of late, the investigations of which have crowded within the last few months our judicial annals,—I very much doubt whether here, in Massachusetts, we should have had to deplore them all, but for the weakness of jurors, who, through a false tenderness of conscience, have permitted those proved to be guilty to go unpunished. Remember that great maxim, long honoured in other lands,—‘*Judex damnatur cum nocens absolvitur*’—the judge is condemned when the guilty is acquitted! The juror who permits the guilty to escape convicts himself! If ever there was a case which required the jury to stand firmly up to the discharge of their great duty as citizens, it is here and now. The mercy of a jury may be more effectually exercised by a conviction, oftentimes, than by an acquittal. How can you tell—who can tell—how many great crimes might have been spared to humanity, if all the verdicts of our juries heretofore had impressed upon the public mind and the public heart, the certain conviction that judicial punishment follows, like its shadow, detected crime?

“I feel, Gentlemen, that there is resting upon you a higher responsibility than ever before rested on twelve men in Massachusetts. Remember that we have had here through these long and weary days, those whose labours will carry this trial and all this mass of proof, unanswered by any explanations on the part of the defendant, into all lands, to be read in all languages, and to be read, Gentlemen, as a memorial of you among all men!—a memorial of the degree of inflexibility and firmness which you shall exhibit in upholding, paramount and supreme, the law under which human life has claimed and

enjoyed protection, in this Commonwealth of Massachusetts, since its foundation by the Pilgrims?"

There is another peculiarity of criminal trials in America, which told with great effect in this case, and might be adopted here with much benefit, namely, the payment by the state of the expenses of witnesses for the *prisoner* in capital cases. The absence of them is used with just power against the prisoner where this is so. Here the expense to a poor prisoner of bringing them forward is constantly urged falsely as a plea in his behalf, when guilty. When innocent, it is a cruel injustice that the prosecution should be empowered, and the prisoner defenceless. This not unfrequently happens. Our niggardly system thus works ill, alike for the ends of justice, whether for the punishment of guilt or the defence of innocence.

There is another beneficial example afforded by the American practice. The counsel for the prisoner speaks *after*, instead of before calling his witnesses. This is a just system; the other an unjust one, for it is a needless disadvantage to make him forestal what his witnesses *may* say.

After the attorney-general had sat down, the prisoner was invited to say a few words, and made an attack on his own counsel, who, "in their superior wisdom," had kept back, he said, evidence he had prepared for them! Why was he asked to say any thing?

The Chief Justice then summed up the case in a most able, terse, and masterly speech, delivered *standing* to the jury. He laid the law down most clearly and fully, and then recapitulated the evidence, without wading through it, as the fashion of some is.

The following remarks on circumstantial evidence, and the natural and apt manner in which they are applied to the case, will illustrate and justify our commendation of this excellent charge:—

"In a case of circumstantial evidence where no witness can testify directly to the fact to be proved, you arrive at it by a series of other facts, which by experience we have found so associated with the fact in question, as, in the relation of cause and effect, that they lead to a satisfactory and certain conclusion; as when foot-prints are discovered after a recent snow, it is certain that some animated being has passed over the snow since it fell; and from the form and number of the foot-prints, it can be determined with equal certainty whether it was a man, a bird, or a quadruped. Circumstantial evidence, therefore, is founded on experience, and observed facts and coincidences, establishing a connection between the known and proved facts and the fact sought to be proved. The advantages are, that as the evidence commonly comes from several witnesses and different sources, a chain of

circumstances is less likely to be falsely prepared and arranged, and falsehood and perjury are more likely to be detected and fail of their purpose. The disadvantages are, that a jury has not only to weigh the evidence of facts, but to draw just conclusions from them; in doing which they may be led by prejudice or partiality, or by want of due deliberation and sobriety of judgment, to make hasty and false deductions; a source of error not existing in the consideration of positive evidence.

“From this view, it is manifest that great care and caution ought to be used in drawing inferences from proved facts. It must be a fair and natural, and not a forced or artificial conclusion; as when a house is found to have been plundered, and there are indications of force and violence upon the windows and shutters, the inference is, that the house was broken open, and that the persons who broke open the house plundered the property. It has sometimes been enacted by positive law, that certain facts proved shall be held to be evidence of another fact; as where it was provided by statute, that if the mother of a bastard child give no notice of its expected birth and be delivered in secret, and afterwards be found with the child dead, it shall be presumed that it was born alive and that she killed it. This is a forced and not a natural presumption, prescribed by positive law, and not conformable to the rule of the common law. The common law appeals to the plain dictates of common experience and sound judgment; and the inference to be drawn from all the facts must be a reasonable and natural one, and, to a moral certainty, a certain one. It is not sufficient that it is probable only; it must be reasonably and morally certain.

“The next consideration is, that each fact which is necessary to the conclusion must be distinctly and independently proved by competent evidence. I say, every fact necessary to the conclusion; because it may and often does happen, that in making out a case on circumstantial evidence, many facts are given in evidence, not because they are necessary to the conclusion sought to be proved, but to show that they are consistent with it and not repugnant, and go to rebut any contrary presumption. As in the present case, it was testified by a witness, that the day before the alleged homicide, he saw Dr. Parkman riding through Cambridge and inquiring for Dr. Webster's house,—having a slight tendency to show that he was then urgently pressing his claim; but not being necessary to the establishment of the main fact, if such witness were mistaken in the time or in the fact itself, such failure of proof would not prevent the inference from other facts, if of themselves sufficient to warrant it. The failure of such proof does not destroy the chain of evidence; it only fails to give it that particular corroboration, which such fact, if proved, might afford.

“So to take another instance arising out of the evidence of the present case. The fact of the identity of the body of the deceased with that of the dead body, parts of which were found at the Medical College, is a material fact, necessary to be established by the proof.

Some evidence has been offered, tending to show that the shape, size, height and other particulars respecting the body, parts of which were found and put together, would correspond with those of the deceased. But inasmuch as these particulars would also correspond with those of many other persons in the community, the proof would be equivocal, and fail in the character of conclusiveness upon the point of identity. But other evidence was then offered, the nature and character of which will be more fully considered hereafter, respecting certain teeth found in the furnace; designed to show that they were the identical teeth prepared and fitted for Dr. Parkman. Now, if this latter fact is satisfactorily proved, and if it is further proved to a reasonable certainty, that the limbs found in the vault and the burnt remains found in the furnace were parts of one and the same dead body, this would be a coincidence of a conclusive nature to prove the point sought to be established; namely, the fact of identity. Why then, it may be asked, is the evidence of height, shape and figure of the remains found, given at all? The answer is, because it is proof of a fact not repugnant to that of identity, but consistent with it, and may tend to rebut any presumption that the remains were those of any other person; and therefore to some extent aid the proof of identification. The conclusion must rest upon a basis of facts proved, and must be the fair and reasonable conclusion from all such facts taken together."

The jury, who seem to have permitted one of their number to publish their proceedings, arrived, without much doubt, at a verdict of Guilty. The Court was then adjourned till the Monday following, when formal motion was made for sentence; which was accordingly passed in an address from the Bench, which fills three pages, the Bar rising at the last part describing the punishment.

The proceedings which afterwards took place on a writ of error will form material for a second article, to which we must defer further and final comments on this singular specimen of American jurisprudence—one signal no less for the great forensic talent and acumen it evinces, than for the operose and redundant complexity of its proceedings. So much overdone justice has never been exhibited, we will venture to say, before, in the history of jurisprudence.

[*To be continued.*]

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## ART. IV.—MARTIAL LAW.

MUCH attention has of late been invited to the subject of Martial Law, and the power of proclaiming and executing it, by the debates and proceedings in parliament respecting the government of Ceylon, by the publication of the Evidence given before the select committee of the House of Commons on the affairs of that island, and by a *resumé* of the whole subject in the last February number of the Quarterly Review. It is not, perhaps, wholly improbable, especially since the proclamation of martial law in Caffraria, that some further proceedings in either House of Parliament may give additional interest to questions respecting this curious, and uncultivated, and (so to speak) wild, tract of law. At any rate the subject must ever be permanently attractive to that large and, we believe, rapidly increasing class of readers whose favourite study lies in constitutional history. We, therefore, devote a few pages to the purpose of putting into as useful a shape as possible the substance of what is to be found in the books relating to it. We are met, however, at the outset, by the fact that no definition of Martial Law has ever been laid down by any authority. The Right Hon. the Judge Martial and Advocate-General of the army (Sir David Dundas) has declared, in effect, that he knows of no sound definition,<sup>1</sup> and our readers will, we can undertake to say, find that, as we have asserted, there is none anywhere extant in any English law authority; and we also perfectly agree with Sir David Dundas, that it is essential to distinguish between martial law and military law, the latter arising out of and being authorized by the Mutiny Acts, and by them solely, the former standing on totally distinct and independent grounds; but, beyond this, we conceive that the reason why no definitions are to be found, either by Coke, much as his attention in his latter years was devoted to the subject, nor by Hale (for what he says, that it is in truth and reality no law, but something indulged rather than allowed as law, amounts, in fact, to a mere description of what martial law is not, and cannot be for a moment considered in the light of a definition to be acted on), nor by Comyns (perhaps our three greatest text writers), is no other than the reason why no authority has drawn the line where the subject's obligation to obedience ends and the right of resistance begins, that reason being, the natural impossibility of framing an accurate definition

<sup>1</sup> 2nd Report of Ceylon Committee, p. 177.

of the thing. If not complete, the resemblance, it will be seen, between the two cases is considerable. To preserve the constitution from destruction by tyranny the subject appeals to force and arms in the one case; to preserve the constitution from destruction by riot, rebellion, or invasion, the executive appeals to force and arms in the other. Each case, it appears to us, is equally incapable, from the nature of it, of being limited, defined, or even stated *à priori*; the circumstances in which either right may arise cannot be told; necessity alone must determine. But though the difficulty of defining martial law,—or, what is much the same thing—of stating when the right of proclaiming it arises, be insuperable, there is, we conceive, little difficulty about *explaining generally* martial law to consist in the suspension of all other laws, and of the rights springing out of them, and the application of force to the summary execution of whatever measures prudence, foresight, tempered by humanity and natural equity, may dictate as indispensable for the safety of the state and the prevention of anarchy; and we agree with Sir David Dundas, there is no authority showing that it may not as well be carried into execution by civilians as by soldiers, provided it has been duly proclaimed or established by the crown. But the power of declaring and executing martial law cannot, we contend, be properly described as a *prerogative* of the crown; for that power arises wholly out of an overwhelming necessity impossible to be met and coped with by other means, and for cases of such necessity no rules or systems can provide, nor, in fact, with such does any jurisprudence pretend to deal. Moreover, neither Stanford nor Comyns, nor, as far as we are aware, any other writer except Hale, mentions this power or right among the prerogatives of the crown. He indeed says, under the head of “Prerogatives which relate to War and Commotions,” with regard to subjects, “He may punish them by martial law during insurrections or rebellion, but not after it is suppressed.”<sup>1</sup> But there is another and a decisive reason why it is not correct to describe this, as Sir David Dundas in his evidence before the above mentioned committee has done, as a prerogative of the crown; namely this, Martial Law is directly contrary to Magna Charta, and no prerogative of the king can be claimed contrary to that statute.<sup>2</sup> The well known words are too plain for cavil to im-

<sup>1</sup> Hale’s Analysis of the Laws, p. 16. As well might it be called a prerogative of the sheriff to call out the *posse comitatus* (which, in fact, was in ancient times a body armed and familiar with the use of arms) in civil cases when a necessity arises. See a curious case of such calling out in rebellion, 2 Jard. Cr. Tr. 85.

<sup>2</sup> See this doctrine and the grounds of it clearly stated, Com. Dig. tit. Prerogative (A.)



pair or sophistry to explain away. *Nullus liber homo capiatur, vel imprisonetur, aut disseisietur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terræ.*<sup>1</sup> Various other statutes have been enacted to the same effect. It may suffice to cite two. The 5 Edw. III. c. 9, "Item, it is enacted, that no man from henceforth shall be attached by any accusation, nor forejudged of life or limb, nor his lands, tenements, goods nor chattels seized into the king's hands against the form of the great charter and the law of the land." The 28 Edw. III. c. 3, "No man, of what estate or condition that he be, shall be put out of his lands or tenements, nor taken, nor imprisoned, nor disherited, nor put to death, without being brought to answer by due process of law."<sup>2</sup> It is true the whole of these provisions came to be very much disregarded as the crown became relieved from the pressure from without of the great barons, at the close of the wars of the Roses, and the Tudor princes exercised martial law, as far as appears, without restraint or complaint, on very shallow pretexts, even on occasions where there was no shadow of necessity; as, for instance, Henry the Seventh proclaimed and executed martial law after the battle of Stoke;<sup>3</sup> and Elizabeth did the same after the Rising in the north in 1570,<sup>4</sup> when 800 persons are stated to have been put to death under it; and other instances, in which its application was still more atrocious and further divergent from legality, occur both in her reign and that of her predecessor.<sup>5</sup> Granting, however, the prerogative of declaring martial law of this description to be vested in the sovereign by the common law, as understood before the reign of Charles the First, it is assuredly incontestable that the Petition of Right was intended<sup>6</sup> and was interpreted to have taken away all such power, and the exercise of it, in the time of peace. This appears from many sources, and, among others, from a curious letter from Lord Conway to Laud, dated 13 July, 1640, stating "The judges are all of

<sup>1</sup> 9 Hen. 3, st. 1, c. 29.

<sup>2</sup> See also 25 Edw. 3, st. 5, c. 4; stat. 42 Edw. 3, c. 3; and the Judgments in Parliament in the Cases of Edmond Earl of Kent, 1 Edw. 3; Hale, Hist. Com. Law, pp. 40, 41; and Thomas Earl of Lancaster, 15 Edw. 2, Lord Nottingham's Note, Harg. Co. Litt. 249, note (190), and S. C. 2 Inst. 48; 3 Inst. 52; 2 Hale, P. C. 217; 1 Hale, P. C. 344, 347.

<sup>3</sup> 1 Rapin, Hist. Engl. 659.

<sup>4</sup> 8 Lingard, Hist. Eng. 51, 56.

<sup>5</sup> See 16 Rym. Fœd. 279; 2 Rapin, 48; 5 Hume, Hist. Engl. 8vo. edit. 454; 4 Id. 419; 1 Hall. Const. Hist. 5th edit. 240.

<sup>6</sup> 3 Car. 1, c. 1, ss. 7, 8, 9, 10.

opinion that martial law cannot be executed here in England but when an enemy is really near to an army of the king's:"<sup>1</sup> and a nearly similar opinion will be found to have been held by Coke in a debate in the House of Commons in the year after the Petition of Right passed, some notes of which are preserved by Rushworth.<sup>2</sup> For Coke declared that martial law could not be executed in a time of peace, and the time of peace he defined to be when the Courts of Westminster be open; and the same definition is laid down in his Comment upon Littleton,<sup>3</sup> with this qualification however, that "when by invasion, insurrection, rebellions, or such like, the peaceable course of justice is disturbed and stopped, so as the courts of justice be *as it were* shut up, et silent leges inter arma, then it is said to be time of war." The Petition of Right therefore has definitively, we submit, settled the question, taking away any claim to such prerogative, quâ prerogative, that had ever been advanced on behalf of the crown, and accordingly the subject does not appear to have been made a ground of discussion at the Revolution, and is not mentioned in the Bill of Rights. Also the subsequent practice has been in close conformity, martial law never having been acted on except in cases of obvious and overwhelming necessity *during* either invasion, rebellion, or insurrection. Before proceeding to illustrate this, by an instance or two from modern history, we may mention that even in the time of Elizabeth the rule of law is laid down by one writer very much more in some respects in conformity with the positions we set out with than might be expected, as follows: Militiæ quoque et in castris princeps absolutam potestatem nullis legum repagulis coercitam habet; ejus placita vim legis sustinent; sine aliquâ processûs judiciarii formulâ, hos morte mulctare potest, illos poenâ; ubi quid deliquerint, corporis quantumlibet castigare. Usurpari quoque interdum ista suprema auctoritas solita est antequam belli facies se aperuerit in subitis nimirum rebellium motibus, sed bonis et cordatis viris parùm approbata, qui malum talis exempli exitum animo prævidentes lege potiùs quàm armis litem decerni voluerunt.<sup>4</sup> Then, in the first Mutiny Act, 1 W. & M. c. 5, which received the Royal Assent, 3rd April, 1689, there is this preamble, which has been copied into every subsequent Mutiny Act,<sup>5</sup>

<sup>1</sup> 3 Rushw. Coll. 1199; and see 1 Hall. Const. Hist. 389.

<sup>2</sup> 3 Rushw. Coll. App. 76, 80, 81.

<sup>3</sup> Co. Litt. 249 a; and this agrees with the Judgment in Parliament in the Earl of Kent's Case mentioned before, p. 32.

<sup>4</sup> Smith, De Republ. Angl. lib. 2, c. 4.

<sup>5</sup> Sir David Dundas is wholly in error in stating in his evidence, p. 178, that the first Mutiny Act in which this recital appears was passed in the reign of Queen Anne.

“Whereas no man may be forejudged of life or limb, or subjected to any kind of punishment by martial law, or in any other manner than by the judgment of his peers, and according to the known and established laws of this realm,” a legislative declaration unparalleled for solemnity, having been repeated in every succeeding session of parliament for 160 years. Assuredly no position of law can be said to stand more clear or free from all manner of doubt than this, that no prerogative of proclaiming martial law now resides in the crown, as a prerogative, and as distinguished from the power which necessity gives, and alone justifies, and which may perhaps be fitly compared to the power which the same sort of necessity gives to the master of a ship at sea, of throwing overboard the freight when no other means present for the safety of the ship and crew, or to the mayor of a town of pulling down or blowing up houses in a fire, when no other means present for the saving the rest of the place. Now turning to the practice, we find that nothing in the nature of martial law has ever been acted on since the Revolution in England,—the misdeeds, sanguinary and disgraceful as they were, of the Duke of Cumberland after the battle of Culloden, occurring on Scottish soil, were perhaps not affected by the above statutes,—except under circumstances of extreme necessity. Such a case unquestionably was furnished by Lord George Gordon’s riots in 1780, when the most atrocious outrages were perpetrated, London was burning in six-and-thirty places, the civil authorities were utterly powerless before the multitude, the gravest fears were entertained for the safety of the Bank of England, the destruction or pillage of which involved national bankruptcy and boundless private ruin, and no man’s life or property in London was worth a week’s purchase. A proclamation was accordingly issued by the king in council, of which the following was the operative passage: “We have therefore issued the most direct and effectual orders to all our officers, by an immediate exertion of their utmost force, to repress the same; of which all persons are to take notice.” This was in fact declaring the law of force, or, as we have already ventured to describe it, martial law; and the exposition of the proclamation given to the troops from the Adjutant-General’s Office shows *that*;—it is contained in the following order of the same date: “In obedience to an order of the king in council, the military to act without waiting for directions from the civil magistrates, and to use force for dispersing the illegal and tumultuous assemblies of the people,”<sup>1</sup>—an order which, it must be said, left a

<sup>1</sup> 23 Annual Regist., App. to Chronicle, pp. 265, 266.

great deal to the discretion of the military ; but no one taken prisoner by the troops was brought to trial before any other than the ordinary courts. The measures then adopted met with general approbation, and even applause, for every one felt they were sanctioned by the urgency of the danger, and by a real necessity. A few years later a still more decisive and vigorous step was taken in this respect by Earl Camden, when Lord Lieutenant of Ireland, who, in the height of the Rebellion of 1798, in a proclamation of the 24th May of that year, issued orders to all general officers to proclaim martial law,<sup>1</sup> and an act of the parliament of Ireland afterwards passed recognizing and sanctioning these measures of the government.<sup>2</sup> And here we have another proof that this is not a prerogative right, properly so called ; for if it be, how came Lord Camden to possess it ? Assuming that a prerogative of this high nature can be divested like a prerogative right to wreck, which is not at all clear, at any rate it is a well-known and universal rule, that the king's prerogative does not pass except by express words, and we believe the Lord Lieutenant's commission contains no words of the sort. Again, *delegatus non potest delegare*, and yet here we have the executive delegating a discretionary power ! But in the interval between the above proclamation and act of parliament a case arose which is especially valuable for the light it throws, imperfect though the light be, upon the mode in which the courts would probably act on a question of martial law coming before them, and from the circumstance that it is nearly the only case in which the question in modern times has been raised in a court of law. Theobald Wolfe Tone, a natural-born subject, had been taken prisoner on board a French ship of war, one of a fleet at sea for the invasion of Ireland, bearing a French military commission as *chef-de-brigade*, and dressed in French military uniform. He was charged before a court martial of officers assembled in Dublin with having " traitorously entered into the service of the French Republic, at open war with his majesty, and assuming a command in the enemy's army, and acting in open resistance to his majesty's forces," with other charges of a treasonable nature ; he was convicted and sentenced to death. Mr. Curran immediately moved the Court of King's Bench for a *habeas corpus*, which was instantly granted, and nothing could exceed the zeal and anxiety displayed by the Chief Justice (the unfortunate Lord Kilwarden) to assert the majesty of the law.<sup>3</sup> A message was ordered to be sent to the officer

<sup>1</sup> Annual Regist. of 1798, App. p. 230.

<sup>2</sup> 39 Geo. 3, c. 11 (Irish), Roy. Ass., 25th March, 1799.

<sup>3</sup> See the report of the very interesting proceedings (which are too long for insertion), 27 How. St. Tri. 614—616, 626.

who had the prisoner in custody, warning him that a habeas corpus was preparing; and subsequently, upon a refusal of obedience to the writ, the sheriff was ordered to arrest him and another officer, and to bring in the body of Tone; notice of the proceedings of the court ordered to be served on the general officer commanding,<sup>1</sup> and a rule made for suspending the execution of Tone, &c. Four years later we find an express declaration by Lord Loughborough, and the Court of Common Pleas in England, "that martial law, such as it is described by Hale, and such also as it is marked by Mr. Justice Blackstone, does not exist in England at all. Where martial law is established and prevails in any country, it is of a totally different nature from that which is inaccurately called martial law, merely because the decision is by a court martial, but which bears no affinity to that which was formerly attempted to be exercised in this kingdom; which was contrary to the constitution, and which has been for a century totally exploded."<sup>2</sup> Thus confirming the distinction taken above between martial law and military law, which last arises solely out of the Mutiny Act, and applies only to the forces.<sup>3</sup>

Now, as we have observed, no text writer enumerates the power of executing martial law among the prerogatives of the crown except Hale, and his doctrine is repudiated by the judgment just referred to; but there is one authority and only one which certainly supports this doctrine to the full, and that is the Irish statute of the 39 Geo. III. above mentioned, which both by way of declaration and proviso most clearly and expressly and in terms acknowledges this prerogative to reside in the sovereign. Probably, however, for the foundation of a doctrine of such vital importance to the constitution a broader basis will be required, especially assailed as it is by the difficulties and inconsistencies with acknowledged and fundamental principles which we have (imperfectly we are aware) attempted to point out. Other difficulties of a logical nature, in which its advocates involve themselves, may be seen in the evidence of Sir David Dundas, before referred to, and especially in his replies to the very searching and close queries put by the late Sir Robert Peel, who evidently regarded the inquiry as one of the deepest interest and gravest importance. Two more authorities, of such weight as must we think at once secure the adherence of our readers to some of the views above proposed, remain to be

<sup>1</sup> See also Phillips's Curran and his Contemporaries, p. 214, and the account of Hevey's case, *Id.* 270.

<sup>2</sup> Grant v. Gould, 2 H. Bla. 98.

<sup>3</sup> Wolton v. Gavin, 20 Law J. (N.S.) Q. B. 73.

cited. In a debate in the House of Lords on the riots of 1780, Lord Mansfield,<sup>1</sup> in a long, elaborate and argumentative speech expressly declared it a great mistake to hold that the royal proclamation authorizing the use of force (in other words, of martial law, as we contend), on that occasion, issued by virtue of the prerogative—a mistake which he said he rose to refute, and which was exactly the reverse of the truth, the king's prerogative being clearly out of the question, and he urged that every man may legally interfere to suppress a riot, much more to prevent acts of felony, treason and rebellion, in his private capacity, and not only so, but is bound to do it as an act of duty. What any single individual may do, so may any number assembled for any lawful purpose. A private man if he sees another committing felony or treason may use force to apprehend him,<sup>2</sup> and would in circumstances be justified in putting him to death, and so may any peace officer or magistrate or number of men assembled or called together for the purpose. That he held to be the true ground for calling on the military power to assist in quelling the late riots. In contemplation of law they are to be considered as mere private individuals acting according to law, and, upon any abuse of the legal power with which they were invested, to be amenable to the laws. A soldier or other military person who had acted in the course of the riots and exceeded the power with which he was invested, Lord Mansfield professed himself not to have a single doubt was triable not by a court martial, but by the ordinary courts of law. Lord Thurlow in a subsequent debate adopted in full all that Lord Mansfield had said, going over the same ground and taking the same points. He besides put the necessity for an act of indemnity, then and usually in such cases resorted to, upon a reasonable and intelligible footing, which is one of the many difficulties before adverted to as appearing and not met in the evidence before the Ceylon Committee. In opposing, repressing and quelling such daring outrages, he said, the military as well as individuals must necessarily have been forced into excesses, which must, he declared, be unavoidable, and which

<sup>1</sup> 21 Hansard's Parl. Hist. pp. 694—698.

<sup>2</sup> 21 Hansard's Parl. Hist. 695, 696, 746. This doctrine was not advanced *pro re natâ*, for it is as old as the Year Books. See 22 Ass. 55; 9 Edw. 4, fol. 26, pl. 36; Lord Say's case, 13 Edw. 4, fol. 8, 9, stat. 17 Ric. 2, c. 8; 13 Hen. 4, c. 7; stat. 24 Hen. 8, c. 5; Cro. Car. 544. Nor is it obsolete or exploded, as appears from a decision by the judges of the other day, Reg. v. Dadson, 20 Law J. (N. S.) Mag. Cas. 57; and see Poph. 121; 2 B. & P. 264; 2 Hale, P. C. 77; per Tindal, C. J., 5 Car. & P. 262; 4 Tau. 449; 1 W. Bla. 47; Hawk. P. C. lib. i. c. 65, s. 11; 1 Hale, P. C. 53, 485, 489, 495.



were the proper objects of an act of indemnity.<sup>1</sup> On the one hand, therefore, neither the military nor other persons employed in carrying into execution a proclamation authorizing the use of force for the suppression of riot or rebellion are amenable for excess to a court martial; nor on the other hand are rioters, felons or others who may be taken prisoners by those so employed. Both must be reserved for indictment and trial by the country in the ordinary course of law. Martial law has nothing to do with courts or trials or any forms of adjudication whatever.

We venture to submit the above remarks to the profession as an attempt at a succinct exposition of the law martial, which we take to be the law of force, including the power of inflicting death on the spot, if the felonious, riotous or rebellious proceedings against which it is directed cannot otherwise be repressed or quelled; arising out of necessity, to be judged of by the executive; but not shielding those employed in execution of it from inquiry as regards any excess in their conduct, but only before a jury under due process of law, nor admitting of trial by any other court or authority, of persons taken prisoners in the course of such operations. The proper use of the proclamation is, we submit, to point out the nature of the acts for the suppression of which force may be employed.

But all that has been said relates it will be seen solely to such British native born subjects as have an inheritance, by virtue of their birth, in the common and statute laws of the realm. The case with respect to the natives of colonies under our rule, to whom the British constitution has never been extended, seems to present various points of difference. Can they, if they rebel or resort to force, claim the same rights and immunities as British subjects? Are their lives and liberties guarded by the same jealous provisions? Fully admitting that the extravagant doctrine of Calvin's case about infidels being *perpetui inimici* must be regarded as utterly exploded,<sup>2</sup> still it may be required to be shown that in the crown colonies the practice at least has ever been otherwise than to resort to force against the natives upon emergencies, without regard to the strict requirements of the law as administered in England.

<sup>1</sup> 21 Hansard's Parl. Hist. 736, 737, 739. Martial law, when established in India, operates to the exclusion of all other tribunals, and allows of no civil action for acts done or authorized during its continuance; *Veeraeethal v. The Shevagunga Zumeendar*, Morley's Analyt. Dig. Indian Law, tit. Army, II.

<sup>2</sup> Some remains of the principle was known to the courts as late as the reign of Car. II. See *Dutton v. Howell*, Show. P. C. 24, 31; and see the Charter of 1661, giving the East India Company power to make war and peace with any persons or people not being Christians.

We here leave the subject, by no means taking credit for having solved any thing like all the questions that may be stated upon it; but, on the contrary, being fully aware that great difficulties beset every view of the subject that can be proposed, difficulties partly peculiar, partly such as belong to all questions of exercise of discretion, and partly arising out of the extent and variety of the British dominions, the number of the population and other matters, which preclude the admission into our constitution of a legal *à priori* mode of conferring a power of proclaiming martial law upon the executive, resembling the happy device of the ancient Roman constitution, by which, when in their opinion the necessity for appealing to first principles arose, the senate might proclaim in effect martial law by the decree *ut consules darent operam ne quid detrimenti respublica caperet*.

J. G.

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ART. V.—THE CAUSE LISTS ON THE OXFORD CIRCUIT,  
PAST, PRESENT AND FUTURE.

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THE Honourable Claude Wilde, Clerk of Assize on the Oxford Circuit, having availed himself of the assistance of Mr. R. A. Goodman, the Clerk of Indictments, in preparing a table of the names of the judges who went that circuit, "and of the nisi prius causes entered before them, from the Lent Assizes 1780 to the Summer Assizes 1849, both inclusive," has recently printed that account for the use and information of the members of the bar and others connected with the Oxford Circuit.

At the present time, when we are on the eve of certainly some, and probably very important and extensive, changes in the practice of the superior courts as well of law as of equity, it will not be uninteresting to take a glance at the past and present condition of one of the principal circuits with reference to the number of causes brought to trial.

The table before us gives first the date of the year with the names of the judges who went the Spring and Summer Circuits, then follows the number of causes entered for trial in each county of that circuit, namely, Berks, Oxford, Worcester, Stafford, Salop, Hereford, Monmouth and Gloucester, with the cities of Worcester and Gloucester in addition. The total number of cases on each circuit, as well as the yearly total, occupy the last column.

In the first year (1780), the total number of causes tried was 230; in the last year (1849), 162, being the lowest number of the whole series, a somewhat ominous fact. The year 1827 gives the highest figure, when the total number of causes tried amounted to 412.

But it is not from such a comparison that any conclusion can be arrived at. The average during a given period is the true criterion. Dividing, then, the whole period of seventy years into ten series of seven years each, we find the following result.

	Years (both inclusive).	Total Number of Causes tried.	Average for each Year (omitting fractions).
1	1780 to 1786	1,768	252
2	1787 to 1793	1,682	240
3	1794 to 1800	1,583	226
4	1801 to 1807	1,624	232
5	1808 to 1814	2,080	297
6	1815 to 1821	2,089	298
7	1822 to 1828	2,219	317
8	1829 to 1835	2,076	296
9	1836 to 1842	1,700	243
10	1843 to 1849	1,486	212
Gross Total..		18,307	261

We have, therefore, a gradual decrease for the first four periods, then a rise for the next three, followed by a decrease more rapid than the previous increase or the first decrease.

The whole period being divided into two parts, it appears that the causes from 1815 to 1849 increased, as compared with the period from 1780 to 1814, by 9·5. But comparing the period 1822—1835 with 1836—1849 the causes in the latter were 26 per cent. less than in the former period.

Let us proceed to inquire how far these vicissitudes may be traced to those more obvious causes which are presented to the mind of the lawyer, namely, to the changes in the law during the period under investigation.

The first of these alterations requiring notice came into effect in 1831. Previously to that year the power of trying Welsh causes at Shrewsbury and Hereford (the next adjoining counties to Wales) was exercised to a considerable extent; and on the cessation of that power in consequence of the abolition of the Courts of Great Sessions in Wales by the statute 11 Geo. IV. & 1 Will. IV. c. 70, which came into operation after the Summer Assizes of 1830, the Cause Lists for those counties were very

considerably reduced. Attention is directed to this fact in the following note to the table before us: "In the year 1831 the English judges first went the Welsh circuits, which will account for the diminution of causes entered in Shropshire and Herefordshire from that period." Nevertheless the effect, though considerable, is not so striking as might be expected. The total number of causes entered at Shrewsbury for the seven years, from 1823 to 1829, both inclusive, was 343, giving a yearly average of 49. The total number at the same place for the seven years subsequent to the change, namely, from 1831 to 1837, (1830, the year of the change, we purposely omit,) was 234, or an average of 33 and a fraction. At Hereford we find 304 causes were entered from 1823 to 1829, giving an average of 43; from 1831 to 1837, 178, or an average of 25 and a fraction.

The Cause Lists at Shrewsbury and Hereford have gradually decreased since 1837 with an equal rapidity. The last seven years (1843 to 1849) give a yearly average of those respective places of only 18, and 12 and a fraction.

As the total decrease in the number of causes on the whole circuit in the seven years from 1831 to 1837, as compared with the seven years from 1823 to 1829, was 408, while the total decrease at Shrewsbury and Hereford on the same comparison was 235, it is obvious that this decrease is not wholly the effect of the before-mentioned statute.

The "New Rules" of pleading came into operation early in 1833, and in the following year power was given to try ordinary actions of contract under 20*l.* before the sheriff.

In 1840 Lord Denman's Act (3 & 4 Vict. c. 24) was passed, depriving plaintiffs of costs in almost all actions of tort where the damages recovered are less than forty shillings, and in 1847 the County Courts Act came into general operation, depriving plaintiffs of costs in most actions in the superior courts where the plaint might have been entered in the county court, and the verdict is for less than 20*l.* if the action is founded on contract, or for less than 5*l.* if founded on tort.

It will be observed, that whatever influences may have operated to reduce the number of causes of late years, the result shown above could not be materially affected by the last-mentioned act, although the effect of that statute is discernible in the three last years of the period.

Assuming for the moment that the rapid decrease in the number of causes during the last twenty years is wholly attributable to these changes and amendments in the law, the variations in

the previous period of fifty years are still left unexplained, and certainly inexplicable on any similar grounds. If we found a gradual increase in the number of causes from 1780 to 1830, it might be fairly assumed that the progression was attributable to the increase of population and capital, continuing therefore until the commencement of that series of changes in the administration of the law which we have already pointed out. But from the year 1780 to the commencement of this century, we are presented with a steady, though gradual, decrease. The increase may therefore be said to form the exception, and a close examination of the whole Table certainly leaves the impression that the general tendency is downwards, and that those who would back the cause lists against time would be playing, in the long run, a losing game.

A glance at the state of the Oxford Circuit upwards of two centuries ago will confirm this impression.

In the Summer Circuit of the year 1647, the number of causes entered at Abingdon was 34. Many more, it may be inferred, were at issue, for Bulstrode Whitelock, the Leader—or, as the Bar termed him in those “times of war,” the *General*—of the Circuit, was retained in 39 causes for trial at that place.

At Oxford 51 causes were entered, Mr. Whitelock having fifty retainers. This long entry was, however, soon dispatched, for although the assizes at Abingdon terminated only on the morning of the 2nd of August, the cause list at Oxford was gone through by the forenoon of the 4th, the Bar riding after dinner to Burford, where they slept on their way to Gloucester, the next place in the then order of the circuit. The Leader had, it seems, to perform the duties which would now devolve on the “junior” under similar circumstances, namely, to appoint the quarters of the Bar.

At Gloucester there was an entry of 77 causes, the “General” being retained in 35. The judges were at Hereford on the 14th. There, we are told, “the people came not in, so that there was but little to do either for judges or lawyers, and the judges, especially Clerk, were very *froward* upon it.” Notwithstanding this complaint, there was an entry of 48 causes, and Whitelock “was full of business,” being retained in 29 causes.

At Shrewsbury there was a list of 75 causes. There, although the Leader was in 38 of them, and tells us he was “wearied with very much business, and *glad of it*,” he was obliged to yield the pre-eminence to a local man—Colonel Mackworth, the governor of the town, “a gentleman of ancient family in those parts, a sober, discreet man and a very good lawyer.” After the business was over, Colonel Mackworth put off his gown and did the

honours as governor of the castle, to Whitelock, showing the latter all his fortifications and stores. Whitelock himself, it may be remembered, held at this time the rank of colonel in the parliamentary forces. At these assizes the high sheriff entertained the judges and lawyers "very nobly."

Of Stafford assizes we have no account this circuit, but at Worcester, which the judges reached by the end of the month, there were 42 causes entered, and Whitelock resumed his sway, being retained in 36.

Such was the condition of the circuit in a period of great commotion and civil war. It is true that the commissions of oyer and terminer had not been issued with great regularity, but there does not appear to have been any unusual entry of causes on that or any other account. On the contrary, at the following Lent Circuit, in February and March, 1648, there was a general increase in the number. At Reading there were forty-four causes; at Oxford only thirty-five (although Whitelock was retained in forty-four); Gloucester, ninety-nine; Monmouth, ten; Hereford, fifty-three; Shrewsbury, ninety-nine; Stafford, seventy. Of the causes at Shrewsbury, we are told, divers of them were concerning plunders.

This was Whitelock's last circuit. At Gloucester he received intelligence of his appointment by the parliament as one of the Commissioners of the Great Seal. Nevertheless he requested permission to complete the circuit, and, having obtained leave, continued to exercise his professional duties to the close.

The *yearly* average number of causes in each county during the seventy years of the Table before us, was (omitting fractions) as follows:—Berks, sixteen; Oxford, eighteen; Worcester and city, thirty-five; Stafford, forty-six; Salop, thirty-one; Hereford, thirty-eight; Monmouth, nineteen; Gloucester and city, fifty-five.

It is evident that the number of causes tried has not only not kept pace with the increase of population and wealth, but has absolutely diminished.

The important question arises whether this diminution, we will not say in litigation, for litigation does not necessarily bear any ratio to the *trial* of actions, but in the cases determined at *nisi prius*, arises from causes which would meet with the approval of the jurist, the legislator, or the political economist, including, of course, the amendment of the law; or whether, on the other hand, it arises from the dissatisfaction on the part of the people at the legal tribunals, and the machinery of those tribunals, as at present established, and their real or supposed inadequacy to determine the points in dispute.



The question raised is a wide one, and its solution involves the consideration of many elements which we have no inclination or leisure to investigate. We propose simply to place before the reader, as concisely as may be, our reasons for believing that, as a general proposition, the reduced cause lists are the result of circumstances independent of the reform of or the abuses in the administration of the law.

To one or other, or at least a mixture of two causes, the one good and the other evil, we assume the phenomena is attributable. We have seen, indeed, that a time was when a diminished cause list on the Oxford Circuit was regarded neither as a symptom of the well being of the community, nor as evidence of a faulty tribunal, but simply as a misdemeanor on the part of the suitors, whose unfounded suspicions and want of faith led them to settle their disputes without the aid of judges or lawyers, making the former at least "very froward." That time has passed away. The Blackstonian creed and belief in the absolute perfection of British judges and British institutions, laying the burden of *their* iniquities on the masses of the people, has become obsolete; so much so, that in the question now before us, it will be admitted that whatever result we may arrive at, and whatever answer we may give, the suitors, or would-be suitors, cannot be implicated. The present condition of the community, aided by the improvements in the law, either renders a long cause list at the assizes unnecessary, or the tribunal is faulty which prevents the full enjoyment of that advantage. In the one case the people is to be praised for its advancement, in the other the legislature is in fault; but in neither alternative can blame be attached to the suitors.

We are not, however, such ardent believers in the progress of mankind towards perfection, as to attribute the decrease in the cause lists to an abstract love for peace, which would induce one party to forego the assertion of what he believes to be his just rights, and restrain another from resisting an unrighteous claim—we do not take any such high position. We do contend, however, that a growing regard for the rights and liberties of their fellow creatures, influencing the conduct of man to man, has had a considerable effect on the one hand in diminishing civil injuries, and on the other, in restraining the vindication of rights to the extreme verge and letter of the law. The decrease may be attributed in a greater degree to the same causes which operate to restrain persons engaged in commercial and agricultural pursuits, from spending their time and their capital in luxuries. Neither the trader nor the farmer can afford the *luxury* of sending his neighbour a writ in a case

where the claim is doubtful. Not that he contemplates the possibility or probability of his having to pay the whole amount of costs of suit down to and including a trial. We believe that in the majority of causes actually tried, any such idea is as foreign to the mind of either party as the particular species of punishment he will have to endure is to the thoughts of the man about to violate the laws of his country. The great majority of suits, we are convinced, are in the first instance commenced and defended without either party *realizing* (to adopt a favourite phrase of the day) a trial in a court of law, or the result in the shape of costs in the event of an adverse verdict. But in our view, the causes which swelled the circuit lists in former days had their origin in some such way as this: A. feels aggrieved at B. for a supposed *tort* or breach of *contract*. A. thereupon goes to his lawyer, represents the case, and inquires what the costs of sending B. a writ will be. He is told one, two or three guineas, according to circumstances. "Well," says A., "I know the worst of that, send him a writ." The writ is accordingly served. B., imbued with a similar spirit to A., likewise consults his attorney, gives his version of the circumstances, and inquires what the cost of entering an appearance will be. A very moderate sum suffices, and B. in his turn, "knowing the worst of that," instructs his attorney accordingly. The mischief is now done. Neither party can retreat without being liable to costs to his adversary, and his pride or his indignation cannot permit him to yield, and at last the parties find themselves in the assize court, from whence one (and sometimes both) issues a ruined man.

Such we believe to be a concise account of the rise and progress of a great part of former cause lists; but in these days of keen competition and reduced prices, the champions who can afford to risk even the costs of a writ or appearance (to say nothing of the time occupied in the process) to gratify revenge, pride or stubbornness, are a diminished number.

An illustration of what has been already said may be obtained from actions for defamation, which have of late years greatly diminished. The old Reports, of the period when Whitlock went the Oxford Circuit, are full of cases of this description, which have now all but disappeared, although there has been no substantial alteration in the law of costs respecting such actions between the reign of James the First and the present time. Lord Denman's Act (3 & 4 Vict. c. 24) did not materially affect such cases, and there is no doubt that suits of this description had become comparatively obsolete before it came into operation. It is true, the preamble of the enactment referred

to, alleges the prevalence and increase of frivolous suits in general, but the number actually tried do not appear to have increased. A vigilant and upright Chief Justice found the evil existing, and sought a remedy; but if such men as Judge Clerk continued to sit on the bench, it is doubtful whether any reform would have been effected to the present hour. To something else therefore, in addition to legislative interference, was that decrease due. It may be traced, we believe, to the diminution of such kind of slander, or when uttered, to the disregard paid to it, as well by the party implicated, as by third persons, and also to the cause last mentioned, namely, the fact that the grieved party could not or would not afford the expense of a writ or the time required in the prosecution of the suits.

It is a fact worth noticing, in considering the position we are now advancing, that the increase in the number of causes from 1800 to 1828 or 1830, includes a period which the farmers and agriculturists look back to as their days of prosperity, when war prices enabled them to lead comparatively easy lives and to indulge in luxuries that are now unheard of. Remembering that the counties of the Oxford Circuit are chiefly agricultural, is it mere imagination that litigation was one of those frequent but now rare enjoyments?

If it be objected that an inquiry into the number of writs actually issued of late years would afford data leading to conclusions at variance with these suppositions, we answer that the rapid march of trade and commercial transactions has led to an incalculable increase in contracts of every description, and consequently to a proportionate increase in the breaches of those contracts; but those breaches are for the most part involuntary, and being utterly indefensible, are speedily arranged by "settling the action" or suffering judgment by default.

A very considerable number of cases there doubtless are in which the action is settled before trial, although both parties prepared for the conflict with an intention and determination to fight it out, and cry "no surrender;" but this has ever been so, and unless the proportion of cases thus born to die unseen and unheard of has considerably increased of late years, this part of the subject forms no essential ingredient in the question before us. Much has been said of the effect of the "New Rules" in producing this result, by narrowing the issue and informing the parties of the real question to be tried, and so enabling them to measure their own strength as well as that of their adversaries. In certain actions of trespass and on the case the effect may be appreciable, but on the whole we are not inclined to attach any great importance to the New Rules in the solution of our problem.

It is the time consumed in the pleadings, rather than the pleadings themselves, that leads to the throwing down of arms or a drawn battle. Time, who is a destroyer after his own fashion, is the great healer of wounds inflicted by the poisoned arrows of a legal battery.

Whether the number of actions of *tort* brought to trial has been materially affected by the New Rules or not, we think that we can perceive a greater cause of their diminution of late years in the gradual settlement and definition of titles to property, corporeal and incorporeal. The Statutes of Limitation and Prescription have done something, the inclosure of commons and the extinguishment of manorial and other rights, more; but the substitution of substantial written evidence for testimony of a shadowy shape, most of all, for the attainment of this object.

To the mere definition of rights by the accumulated decisions of the courts of law, with a due respect for the hundreds of thousands of pounds spent in the construction of the aptly named Statute of Frauds, we do not attribute any very great weight in diminishing litigation, and what may be properly referred to this head is counterbalanced by the increasing perplexities of the statute book.

We believe then that the chief circumstances which have heretofore tended to diminish the cause lists, however much the *rate* of diminution may have been affected by amendments in the law, are such as are at once innocuous and beyond control.

If our premises are true, we must be prepared, it may be said, to support this proposition: that supposing the costs of a suit were forthwith pared down to the lowest possible amount, and the proceedings simplified, the same general result would be exhibited, namely, diminished and diminishing cause lists. But we are *not* bound to accept the proposition tendered, in those terms. One effect of such reforms would be of necessity to hasten the progress of a suit and to diminish the interval between the initiative and final steps, and in proportion as that time were diminished, so much less would be the pressure on the parties to effect a compromise. One admitted cause for the excess of actions commenced, over those tried, is their settlement in consequence of the mere lapse of time between their commencement and the period at which they are ripe for trial; but as we have assumed that this cause has operated uniformly, or nearly so, at all times, the above proposition must be amended thus:—supposing the costs of suit had, from the year 1780, been at their minimum, and the proceedings simplified to the maximum extent, the same general results would be exhibited, diminishing cause lists. In this form we accept and support it. The only diffe-

rence would have been that, while the relative proportions in a given series of years remained much the same, the absolute number of causes, past and present, would be found materially increased. But impose these conditions of simplicity, cheapness, and speed for the future, and then, although we have the tendencies to diminution already enumerated still in force, there will be the counterbalance of the new features. The extent of this counteraction, whether merely to keep the cause lists at their present average or to raise them to their former glory, must depend upon the number of cases in which now either the writ is not issued or the action does not proceed to trial from the actual *plus* complexity, prolixity, and expense of the operation, or the dread of those three attendant graces upon a law suit.

If the whole expenses of the preparation for and conduct of a suit from the commencement to the end be furnished out of the public purse, and witnesses are paid from the same source or are compelled to attend without remuneration, so that an issue might be raised, tried and determined, as far as regards the parties themselves, without mature consideration, and with some such facility as two disputants on the subject of the age of Madame Vestris, or the performances of a three year old, obtain the judgment of the Editor of "Bell's Life," then thoughtless litigants would probably appear before the courts in shoals; but as long as the costs of a cause have to be borne by one or both of the parties, that must operate as a material check, the mere amount of those costs having, however, no very perceptible effect.

The practical working of the County Courts does not militate against this supposition. It is true that the great majority of cases which are brought to trial in those courts are virtually undefended and indefensible, although both parties appear; but the defendant goes into court either without a professional adviser, or if he has secured the services of an attorney, the latter attends the court upon hasty instructions, and rather to watch the case for his client than having any substantial question to raise. The number of even such cases is, however, diminishing, and will decrease daily.

But in an action in the superior courts, much as costs may be cut down and the form and technicalities of pleading simplified or abolished, it is difficult to conceive any course which will not entail a considerable amount of costs, and also such a lapse of time between the commencement and termination of the suit, as will ensure a certain amount of caution and reflection on both sides before it be carried to trial. We do not anticipate, therefore, that any material increase in the number of causes for trial will follow any scheme of amendment in the practice of the

superior courts. If it should counterbalance the effect of the several statutes which give jurisdiction to the County Courts, and deprive parties of all costs where they recover less than a certain amount in the superior courts, it is more than we anticipate.

Having stated, as we believe, the *main* grounds upon which the diminution of the Cause Lists have heretofore depended, it cannot be denied that the actual rate and progress of that reduction have been greatly accelerated by improved legislation.

Enabling parties to state a case for the opinion of the court where the facts are undisputed, the restraint of vexatious actions against parties occupying official situations (a restraint which perhaps in some cases has been carried even too far), and especially the deprivation of all costs where the damages given, and consequently where the damages sustained are trifling, have each and all operated in the same direction. As regards the last mentioned class, the county courts acts are the most sweeping in their operation, but, as has been already observed, their effect is of necessity only perceivable at the close of the table at the head of these observations. It is beyond a doubt, however, that the courts in question (the working of which we agree with Lord Cranworth has been on the whole admirable) have effected a great diminution in the number of causes tried in the superior courts.

One other source of the diminution of Cause Lists on the circuits, is the spirit of centralization and the facilities of locomotion. We allude to the laying of the venue and consequent trial of actions in Middlesex. Besides those cases where the action is defended merely for the purpose of gaining time, and the plaintiff's attorney lays the venue in Middlesex to obtain speedy judgment; there is a class of cases, an increasing one we fear, where no such emergency arises, and the reason for trying in Middlesex has its origin in some desire for increased costs of journeys and the probability of the cause being made a remanet, a desire either shared in or not resisted by the defendant's adviser, the suitors themselves receiving some plausible excuse and not dreaming of the injustice practised upon them.

In conclusion, we must guard against any misinterpretation of our observations. In denying that the heavy amount of costs consequent upon an action operates to any great extent in unduly diminishing the number of causes brought to trial, we do not for a moment seek to vindicate the system which entails those costs. It is not because they may not operate prejudicially in trammelling the proceedings of inexperienced parties, that the injury inflicted upon suitors of experience—alas of how sad



and painful an experience—does not call for abatement and relief. The patient suffering from disease does not the less need the assistance of medical skill because his ailment is neither contagious nor infectious. So the case of the suitor in our courts who has been ruined by his suit does not the less demand attention because his example has neither hurried on nor deterred others from a similar fate. Curtail them as you may, costs, and heavy costs, must attend the trial of causes as long as skilled labour is entitled to and does receive higher wages than mere physical exertion; but there are huge parasitical excrescences from this evil, sometimes of larger size than the parent tree, which require the application of the knife. There is a word for example already mentioned, which is a disgrace to our system and ought never to appear. The term *REMANET* is of fearful import. A delay of justice is the least evil involved in it. With it are associated anxiety, disappointment, bankruptcy and beggary.

*J. E. D.*

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#### ART. VI.—THE AMERICAN CRIMINAL CODE.

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IN our last number we gave a slight sketch of the new Code of Civil Procedure in the State of New York, which from its simplicity, practical views and the truly popular manner in which it was drawn up, has excited great interest in this country, not alone amongst the laity, who always welcome with open arms a startling novelty, but also among the thinking members of the legal profession. To free the “glacier” of the law, if the simile may be permitted us, from the “moraine” which has been accumulating upon it for ages, sullyng its purity and retarding its progress, is now the wish of all. Opinion upon this point has undergone great change. The commissioners in this code profess to have accomplished this, and to have rendered their law more simple, less costly, and more direct and speedy in its action. The Law Amendment Society, naturally anxious to ascertain whether the results of this code justify this assertion, sought answers, as before stated, from high authorities to a series of questions propounded with that view. These have been promptly and favourably answered, and by men who, like Chief Justice “Duer,” have not simply a national, but a world-wide reputation. We give below the letters hitherto received as a pendant to our last article, and we feel that their tenor fully bears us out in the favourable opinion we there expressed.

The first is from Mr. Justice "Ingraham," one of the judges of the Court Common Pleas in New York, and is as follows:—

" New York, Jan. 13th, 1851.

" Dear Sir,—In answer to your favour of the 9th instant, asking my views in regard to the practical working of the code, I can only give you the results of my experience. I consider the code as containing three prominent alterations in the administration of justice,—viz., the abolition of all forms of actions; the union of law and equity jurisdiction in the same tribunal; and the alteration of the system of pleading so as to abolish technicalities and forms, and to substitute a plain statement of the facts constituting the cause of action or defence. I have no hesitation in saying that in my judgment the abolition of different forms of actions, and the new system of pleading, when properly carried into effect, will prove to be desirable reforms, and that I have seen nothing in administering the law under this system to lead to a contrary opinion. The first relieves the courts from a large amount of litigation upon very immaterial matters, and enables the courts to decide upon the merits of the controversy that comes before them without reference to useless questions of form; and the second relieves the parties from that nicety of pleading which had, under the old system, become burdensome, while it presents to the court on the trial the real merits involved between the parties. Difficulties, it is true, are constantly arising before the courts, in restraining the parties from inserting in the pleadings improper or irrelevant matter, instead of confining such pleadings to the simple statement which the code directs; but as soon as it is understood that such matters will be stricken out or disregarded by the courts, and the pleadings be confined to what the code permits to be inserted therein, I am satisfied that the true issues will more easily be presented for trial, and much time be saved in the courts on the trial of causes. In regard to the union of law and equity jurisdiction, I have hardly had sufficient experience to give you an opinion as to the practical effect of the change. But few causes of this description have as yet reached the courts for trial. So far as I have had an opportunity of forming an opinion, it is favourable to the change. The result will undoubtedly be a great saving of time and expense to the suitors, and a more speedy decision of cases by the courts. The residue of the code relates to mere details of practice. In the introduction of a new system of this kind it must be expected that many omissions and defects will be found, requiring either judicial decisions or legislative action to remedy. It will require time to perfect the system, with a determination on the part of the judges fairly to carry it into effect, and if there could be some plan resorted to by which the contrary opinions of judges on questions of practice could be reviewed, it might be much more efficiently and speedily accomplished. If terms of the Supreme Court, consisting of three or five judges, were appointed to decide appeals on questions of practice once or twice in a year, whose decisions should control all the courts,

uniformity in the construction of the code would be much sooner attained, and one of the greatest difficulties in the practice under the present system would be removed. Under any view of the matter, I do not think a return to the old system desirable. Our exertions now should be to render the present practice as perfect as possible.

“ I am, with great respect, truly yours, &c.,  
(Signed) “ D. P. INGRAHAM.”

The next is from three judges of the Superior Court of New York :—

“ Superior Court Chambers, New York,  
Jan. 7th, 1851.

“ Dear Sir,—In answer to your inquiries as to our views in regard to the practical operation of our code of procedure, we have no hesitation in saying that we consider it a very great improvement upon the former practice, especially in those particulars in which it has made the most radical changes; we refer to the abolishing the distinctions between the different kinds of actions, the abrogation of the old system of pleading, and the blending of legal and equitable jurisdiction. It was upon this last feature of the code that we had the most serious doubts; but those doubts have been completely removed, and we regard the administration of legal and equitable remedies, not only in the same forum, but, when necessary or proper, in the same action, as one of the greatest advantages of the new system. A suitor is no longer told after several years spent in seeking legal redress that he is to be sure entitled to it, but he has mistaken the place, he must apply at the next door; on the contrary, he now obtains at once all the relief to which the facts of his case, as set forth in the pleadings and established by the proofs, entitle him, whether that relief be legal or equitable, or both. We have had considerable experience in hearing equity causes, many of them transferred from the old Court of Chancery, and of that class of cases which, under the new system, are tried before the court without a jury; and although we had our misgivings as to the expediency and practicability of the proposed mode, yet we have found that the oral examination of witnesses in open court is not only the shortest but the most satisfactory method. In several important and intricate equity causes we have taken all the testimony as at nisi prius, and then heard the causes upon the pleadings and the proofs thus taken, the whole trial and argument in each case occupying but a few days, when under the old system months would have been spent and great expense incurred in taking the testimony alone. The power which the court possesses of excluding improper and irrelevant testimony, and that which is cumulative merely of itself, confers an immense advantage on the new system. When the facts have been numerous and complicated, we have sometimes adopted the practice of our Court of Admiralty, and adjourned the cause for a few days after the evidence was all in, to enable the counsel to prepare more thoroughly their argument on the law and the facts. Upon the whole, we are entirely satisfied that justice is

now more promptly and more cheaply administered than it was under the old system, and the rights of litigants as carefully protected. There are, we admit, many inconveniences growing out of so sudden and entire an alteration in the modes of proceeding, and the labour of the judges has been not a little increased. Many of the provisions of the code are misunderstood and improperly applied. There is much loose and inaccurate pleading, since it is not every lawyer who can state his case in a complaint on declaration with brevity and perspicuity, and there is sometimes a clashing in judicial construction of some of the sections. But we do not think that the evils arising from these sources are greater than might have been anticipated. They are temporary in their nature, and are, we think, more than counterbalanced by the benefits to which we have referred. We are not to be understood, however, as saying that the code is perfect in its present form. We think it susceptible of amendment in many respects, and especially on the subject of pleading. Some provisions, we think, ought to be inserted, which would oblige the parties to render the pleadings more definite, and to present more distinctly the issues to be tried. Some of the sections also are ambiguous and obscure; but these defects will probably soon be remedied by judicial construction or legislative action, and such other alterations and improvements as experience may suggest can easily be made. The general features of the code, however, will be retained. Notwithstanding the disfavour with which it was at first received by a large portion of the bar, and we believe we may add of the bench, yet we think that a large majority of both would at the present moment be opposed to a return to the old system; and before many years shall have rolled on, it will be a matter of astonishment how we could ever have endured it so long. It will be understood that we have had reference in what we have said to the code of 1849, which is in force at present, and not to the code prepared by the commissioners last winter, with the details of which, so far as they differ from the present code, we are not familiar.

“ We are, dear Sir, with great respect, yours truly,

(Signed)

“ JNO. DUER,

“ JNO. L. MASON,

“ WILLIAM W. CAMPBELL.”

Let us now turn to the criminal code drawn up by the same commissioners. It will be seen that this code has made great and important changes in the power and duties of grand jurors, and in the whole subject of criminal pleading.

In legislating upon so wide a subject it is almost needless to say great care was required, for no branch of judicial procedure is more important or requires more care. The peace and welfare of society demand that the law for the prevention and punishment of crime should be certain in its operation and afford full protection to the lives and liberties of all. Punishments should also be proportioned to the crime committed, and being so should

be rigorously enforced. We err when we strain justice into cruelty. The commissioners appear also to have been fully sensible that too great dispatch in matters of grave importance is, like hasty digestion, sure to fill the body full of crudities and the secret seeds of diseases; for they say—

“That they have been for several months engaged in the consideration of the important subjects embraced in this code, and had weighed with great caution every view which has suggested itself to their minds as well in respect of the principles upon which they should proceed as to the details—even the minutest by which those principles could be successfully carried into practice.”

That they have done this is apparent; for they have departed essentially from the plan of the execution of their duties as contained in their code of civil procedure; they have condescended to much greater minuteness, and entered more fully into detail. In the civil code much, perhaps too much, reliance was placed on the fact that those who had to administer it were practically and perfectly acquainted with the main rules governing legal procedure, and that minuteness of detail would consequently rather tend to confuse than to aid in the application of principles which could readily and beneficially be reduced into practice if seconded in the right spirit by the bench and the profession. Here, however, it is different; much of the criminal law has to be administered by men untrained to the law, and who, in the exercise of their magisterial duties, involving in many cases a discretion both difficult and delicate, look for and require a sure guide at every step. We shall, however, scarcely be disposed to quarrel with them on our side of the Atlantic for this; but welcome as it deserves a sober spirit of pains-taking inquiry and caution, not common among the American people, upon whom, as a nation, Sydney Smith's satire on Lord John Russell, “that he would at any moment take command of the channel fleet,” would not be misapplied.

It has until lately been the fashion to treat the notion of reforming the law as idle and chimerical. We confess that we do not see the justice of this; and cite with pleasure Lord Lyndhurst's opinion (on the question of reform in the Court of Chancery), that if we wait for a concurrence of opinion upon such a subject, instead of providing a practical remedy for a great practical evil we shall do a great injustice to the nation at large. Be this as it may, it has long been acknowledged that legislation perplexed is synonymous with crime unpunished; and the slightest acquaintance with our own criminal courts sufficiently attests this truth. Numberless are the cases which might be cited illustrative of this, but none perhaps more preg-

nant with warning and instruction than the late case of the "Birds," with which the public are unfortunately so familiar. On all hands it is conceded that the principles and details of criminal practice require a searching and rigorous examination; and it is certainly to be regretted (although much in the mean time has been done by piecemeal,) that the prolonged labours of our Criminal Law Commission, appointed sixteen years ago, should not have resulted in the enactment of those reforms which they have recommended, and that our law on this subject should still remain uncoded.

If, therefore, our readers shall be of opinion that this sequel to the law reform, begun in the civil code, shows that care and attention have been bestowed upon it, and that the commissioners have executed their task with a due sense of its importance, they will not refuse their meed of approbation to the men who have rescued the subject from the acknowledged darkness in which it had previously been shrouded.

"The commissioners state that their design in this code has been to revise the whole course of criminal procedure now in operation, to supply its defects, to correct its errors and abuses, and to substitute for the existing system of practice one which, while it should be just in its principles and simple in its details, should embody the entire regulation of this branch of practice, whether founded upon ancient and unwritten usage or governed by statutory enactment."

We shall pursue in this article the same plan as in our last, simply laying before our readers those parts of the code which are interesting either from the novelty or importance of their provisions.

The act is divided into eight parts. The

1st, embraces general definitions and provisions; the

2nd, relates to courts having original jurisdiction of criminal actions; the

3rd, to the prevention of public offences; the

4th, to the removal officers by impeachment or otherwise; the

5th, to the proceedings in criminal actions prosecuted by indictment; the

6th, to proceedings in police courts; the

7th, to special proceedings; the

8th, to costs.

The first part, after defining crimes and public offences, enacts, that upon conviction either of the following punishments may be inflicted:—

Death;

Imprisonment;

Fine;



Removal from office ; or

Disqualification to hold any office of honour, trust, or profit, under the state.

Transportion, as a punishment, is unknown to the American law. A felon is never sent even from one state of the Union to another to expiate his crime.

The act then enacts that every public offence must be prosecuted by indictment, except certain offences next specified, the most singular of which is that of "racing animals within one mile of the place where a court is held." "Petit larceny, charged as a first offence," is also excepted.

By section 11, "depositions properly taken under this act may be read upon its being satisfactorily shown to the court that the witness is dead or insane, or cannot with due diligence be found within the State."

It appears, therefore, that depositions are not received in the case of illness too severe to admit of *vivâ voce* examination in court; a case now provided for by our own law.

The 2nd Part relates to the Courts of Criminal Jurisdiction, which, except police courts, are severally courts of record.

The 3rd and part of the 5th Part contain numerous sections defining clearly the Duties both of public officers and private persons in the Prevention of Public Offences, and the Arrest of Public Offenders, as also when lawful Resistance may be made by the party about to be injured.

We believe that, with the exception of those statutes relating to the binding over to keep the peace and the suppression of riots, the duty of both officers and private persons on this important subject has been left with us entirely to the regulation of the common law. The consequence has often been, that those who on a sudden emergency are required to aid in the preservation of public order and the prevention of crime are uninformed in most cases as to their duty, unless they should have groped for this knowledge amongst the almost inaccessible recesses in which it lies hid; for it need hardly be said that to the public at large the text books of criminal practice, both ancient and modern, are as unknown and unexplored as the wildest regions of Africa; sources as fabulous and involved in as much mystery as that of the "White Nile." At the same time the law holds that "*ignorantia legis neminem excusat*," and punishes for the neglect of that duty which it has not taken sufficient pains to explain. The hardship of this needs no comment. The commissioners have endeavoured to obviate this, and have introduced a variety of provisions of a practical nature embracing this subject.

(Vide. sections 53 to 91, and 158 to 177.) The great length of our subsequent extracts on the grand jury and their duties and power, the form of the indictment, and criminal pleading, leave us no space to give these sections "in extenso."

The 4th Part relates to Removing Public Officers by impeachment or otherwise.

The 5th Part is devoted to the Proceedings in Criminal Actions prosecuted by indictment, and is divided into twelve subdivisions. The 1st relates to the *Local Jurisdiction* of public offences, and the only section we shall give is the 127th, which enacts,

"That the jurisdiction of an indictment for the crime of forcibly and without lawful authority seizing and confining another, or inveigling or kidnapping him with intent, against his will, to cause him to be imprisoned or secretly confined within the State, or sent out of the State, or to be sold as a slave, or in any way held to service, or of selling or in any manner transferring for a term the services or labour of a black, mulatto or other person of colour, forcibly taken or kidnapped from this State, or to any other state, place or country, or in any county in which the offence is committed, or into or out of which the person upon whom the offence was committed may in the prosecution of the offence have been brought, or in which an act shall be done by the offender in instigating, procuring, promoting, aiding in, or being accessory to, the commission of the offence, or in abetting the parties concerned therein."

We have given this section because the "Fugitive Slave Bill," passed last session by the United States legislature, has caused great excitement and rioting in one or two of the free States of the Union. This bill illustrates clearly the power of the federal legislature to interfere with the action of the local laws of each State; an exercise of which authority has on more than one occasion caused open and active war between a particular State and the federal power; witness the cases of "South Carolina" and "Rhode Island." The provisions of this bill are well known, suffice it to say that it overrides entirely the section above quoted, as it gives power to any slaveholder to enter the State and there forcibly seize and carry off any slave formerly belonging to him—a power most obnoxious to a free people, and indeed a disgrace to humanity—it remains to be seen whether the Northern and Eastern States will quietly submit to it.

The 2nd Title of this Part relates to the *Time* within which an indictment must be preferred.

In murder no time is limited.

In the following cases within two years :

1. Falsely representing or personating any person, and in such assumed character marrying another.

2. Inveigling, enticing or taking away an unmarried female of previous chaste character, under the age of twenty-five, for the purpose of prostitution.
3. Seducing and having illicit connection with an unmarried female, of previous chaste character, under promise of marriage.

In all other cases the indictment must be preferred within three years; and by

Section 136. "If, when the offence be committed, the defendant be out of the State, the indictment may be found within the term herein limited after his coming within the State; and no time during which the defendant is not an inhabitant of or usually resident in the State shall be a part of the limitation."

The 3rd Title comprehends the *Proceedings to the commitment*, inclusive, which are in entire accordance with our own law.

The 4th Title relates to the *Grand Jury*, their power and duties. They are chosen by ballot from the grand jury list, and must be not less than sixteen nor more than twenty-three in number. The drawing takes place at the office of the county clerk, not less than fourteen nor more than twenty days before the holding of the court. Many succeeding sections relate to fines, excuses for non-attendance, &c., and by

Section 250, "A person held to answer to a charge for a public offence may *challenge the panel of the grand jury, or any individual grand juror.*"

Then follow the causes of challenge, both to the panel and to individual grand jurors, and by

Section 266, "The grand jury has power, and it is their duty, to inquire into all public offences committed or triable within the county, and to present them to the court either by presentment or indictment, or as provided in the next two sections.

Section 267, "Upon such inquiry they may, where *the defendant has been held by a magistrate to answer the charge, and in no other case*, if they believe him guilty thereof, find an indictment against him.

Section 268, "*In all other cases*, if upon investigation the grand jury believe that a person is guilty of a public offence, they can proceed *by presentment only.*"

When, if the court think that the facts stated in the presentment constitute a public offence triable within the county, it shall direct the clerk to issue a warrant against the defendant. The difference between an indictment and a presentment will be familiar to our readers, but we here allude to it as it illustrates

an important principle more fully developed in the following extracts, which, although long, ably and clearly explain the view the commissioners take of the benefit to be derived and the evils to be apprehended from the uncontrolled power which grand jurors might exercise, and the nature of the duties they were required to perform, under the law as it previously stood. We here simply state that upon an indictment the prisoner is of course to be held for trial; upon a presentment only to the court, to be sent for examination before a magistrate as if an information had been laid before the magistrate in the first instance, and with the same opportunity for explanation or defence.

“By section 272, In the investigation of a charge either for presentment or indictment, the grand jury shall receive no other evidence than such as is given by witnesses produced and sworn before them, or furnished by *legal* documentary evidence.”

“Section 273, The grand jury shall receive *none but legal evidence and the best evidence in degree*, to the exclusion of hearsay and secondary evidence.”

This is an important change—with us the grand jury may require the same evidence, written and parol, as will be necessary at the trial to support the indictment. In practice, however, they are usually not very strict as to documentary evidence, often admitting copies where the originals alone are evidence, and at times even evidence by parol of a matter which should in strictness be proved by written evidence. In fact, there is now no established rule upon this subject with us; and grand jurors are left wholly uninformed, except as they are occasionally instructed upon it by the court, as to the precise line of duty marked out for them by the law, consequently bills are often found (particularly at county and borough sessions) upon evidence wholly inadmissible, and even, if admissible, wholly inconclusive.

The propriety and usefulness of grand juries has been lately much debated, and great authorities have not been wanting, particularly in the city of London and in Middlesex, to advocate their abolition. One thing, however, is certain, that the preservation of their usefulness, like that of every other department in the administration of the law, depends upon a clear and well understood definition of their powers. When the duties of a grand jury in direct criminal accusations are confined to matters given them in charge by the court, or preferred before them by the Attorney-General, and to those which are sufficiently within their own knowledge to authorize a presentment, the subsequent observations do not of course apply. It is only where they can, as stated by the Commissioners, originate on

the application of *any one*, proceedings against a person, that the evils reprobated arise. Grand juries had their origin at a time when the conflicts between government on the one hand, and the rights of the subject on the other, were unremitting—and they were wrung from the hands of the crown as the only means by which the subject, appealing to the judgment of his peers under the immunity of secrecy and irresponsibility, could be rendered secure against oppression. Fortunately in the present day their value in this respect is utterly useless. But the question next arises, is this secrecy never used as a means of gratifying private malignity; that it has been so used is a fact which admits of no denial. Cases have occurred where parties, stimulated either by avarice or revenge, have found their way into a grand jury room, and upon a state of facts which would not warrant the commitment of the defendant in any other form, have succeeded in obtaining an indictment against him. The grand jury was not designed to be converted into an instrument of private cupidity or vengeance. Instead of being an accusing party, it is, and ought to be, a judicial tribunal; and as it is frequently composed of men by no means remarkable for discretion or learning, limits should be set to the extent of its powers, and restrictions placed upon their exercise.

The Commissioners say, that

“under the present system these safeguards cannot be found. Within the sphere of what they choose to consider their duties, the grand jury is omnipotent. Accusations in which the public are deeply concerned may be dismissed without a question. Indictments may be preferred upon slight evidence, or upon no evidence, and the action of the grand jury is beyond the reach of the laws. From the abuses of which it is susceptible, and which have been too often practised under its unconscious sanction, it is not to be disguised that its moral power is waning. These remarks are made in no unfriendly spirit to the existence of this institution, but from a firm conviction that some restraint must be thrown round its action. To effect this, the first principle that the commissioners assume is, that the functions of the grand jury, as an accuser and as a judge, should be separated. It is not proposed to abridge their powers in respect to the inquiry into the commission of crime. These seem to be an inherent element in its composition. But the proceedings which are taken upon them should be essentially different. When the accused is arrested and brought before a magistrate, an opportunity is afforded him of answering the charge; a responsible accuser is also presented, to whom he may look for redress if the accusation be malicious or unfounded. But when he is accused *by* the grand jury this protection is denied him, and he is dragged before the bar of justice, to answer a charge possibly as false in its substance as it may be malicious in the motive

by which it is prompted. A course of practice which results in this injustice is not to be defended upon any principle sanctioned by the wisdom of the common law. Its theory is, that every man shall have a full opportunity to meet an accusation against him, and it is a violation of that theory that he should be subjected to any stage of condemnation without the privilege of being heard in his own defence. The commissioners have therefore proposed two modes of proceeding upon the action of the grand jury; first, that where the defendant has been held to answer the charge, and in no other case, the grand jury may if they believe him guilty, find an indictment against him; second, that if, upon an investigation of a charge against him, whether originated by themselves or presented by another, they believe he is guilty of a public offence, they must proceed by presentment.

“With regard to restricting the grand jury to legal evidence and the best evidence in degree, they say that these are simple and elementary rules; they are rules applicable to every judicial investigation, in accordance with which the examination before the magistrate must be conducted, and by which finally the trial jury will be governed. In case of doubt with respect to them, that doubt can be readily removed by application to the court; and finally, it appears to be the only means to avoid great occasional injustice.”

Another question of some practical difficulty in defining the duties of grand jurors is how far is the grand jury bound to hear evidence in exculpation of the defendant? The Commissioners appear to have considered, that as the object of a public prosecution is to place the defendant on his trial, when there is reasonable evidence of his guilt; his defence should be the subject of inquiry at the hands of the jury at the trial. Nevertheless they have provided, that when the grand jury think that other evidence within their reach will explain away the charge, they may order it to be produced and consider it.

Section 274 enacts,

“That the grand jury is not bound to hear evidence for the defence; but it is their duty to weigh all the evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they should order such evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses.”

The next subject is the *Indictment*.—“On the subject of its form, the commissioners have been guided by the same desire to substitute for the verbose and technical form now in use a system of pleading founded upon unerring principles of justice, and having for its end the attainment of right, without regard to form.” As a sanction to this we will mention, that our own criminal law commissioners have, after the fullest con-



sultation with the bench and the bar, recommended in their 8th report "that all acts, omissions and circumstances essential to the offence must be plainly, directly and distinctly stated, in such a manner as to enable a man of ordinary understanding to know what is intended." Again, "Archbold," in his "Criminal Pleading and Evidence," says, "all the ingredients in the offence with which the defendant is charged, the facts, circumstances and intent constituting it, must be set forth with certainty and precision, without any repugnancy or inconsistency." Yet upon this simple definition has been built a superstructure of rules and illustrations which, to say the least, it is not easy to understand, and which few will be found to defend. What is the object of pleading either in civil or criminal actions? Is it not to inform the parties of the facts alleged by each against the other, with such clearness as to enable them to prepare for the trial of disputed facts, or for the application of the law to those facts? Why then should not the statement of the crime imputed to the prisoner be stated in the indictment with such a particularity of circumstances only, as will enable him to understand the charge and prepare for his defence? and to authorize the court in applying the law to the facts charged? To cite instances in which this simple rule has been departed from is needless—every page of our text-books is full of them. We now allude to them with no view of appealing to prejudice against subtleties which were invented as a means of administering justice; but as an argument against the continuance of what is most certainly a perversion of the first principles of justice and common sense.

Proceeding upon this principle the Code enacts—

By section 302, "That all the forms of pleading in criminal actions heretofore existing are abolished, and hereafter the forms of pleading, and the rules by which the sufficiency of pleadings is to be determined, shall be those which are prescribed by this Code."

By section 304, "The indictment shall contain the title of the action, specifying the name of the court to which the indictment is presented, and the names of the parties."

"A statement of the acts constituting the offence, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what was intended."

By section 307, "The indictment must be certain as regards the party charged; the offence charged; the particular circumstances of the offence charged, when they are necessary to constitute a complete offence."

By section 309, "The indictment shall charge but one offence, and in one form only; except that where the offence may be com-

mitted by the use of different means, the indictment may allege the means in the alternative."

By section 312, "The words used in an indictment shall be construed in their usual acceptation in common language, except such words and phrases as are defined by law, which are to be construed according to their legal meaning."

By section 313, "Words used in a statute to define any public offence need not be strictly proved in the indictment; but other words conveying the same meaning may be used."

By section 316, "No indictment shall be deemed insufficient, nor shall the trial, judgment or other proceedings thereon be affected by reason of any defect or imperfection in matters of form, which shall not tend to the prejudice of the defendant."

By section 317, "Neither presumptions of law, nor matters of which judicial notice is taken, need be stated in an indictment."

By section 319, "An indictment for libel need not set forth any extrinsic facts for the purpose of showing the application to the party libelled of the defamatory matter on which the indictment is founded; but it shall be sufficient to state generally that the same was published concerning him; and the fact that it was so published must be established at the trial."

By section 321, "In an indictment for perjury, or subornation of perjury, it shall be sufficient to set forth the substance of the controversy or matter in respect to which the offence was committed, and in what court, and before whom the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer the same, with proper allegations of the falsity of the matter in which the perjury is assigned; but the indictment need not set forth the pleadings, record or proceedings with which the oath is connected, nor the commission or authority of the court or person before whom the perjury was committed."

By section 322, "Upon an indictment against several defendants, any one or more may be convicted or acquitted."

By section 323, "The distinction between accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offence, or aid and abet in its commission, though not present, shall hereafter be indicted, tried and punished as principals, as in the case of a misdemeanour."

By section 324, "An accessory after the fact to the commission of a felony may be indicted, tried and punished, though the principal felon be neither tried nor indicted."

These sections contain the rules to be substituted for the former practice of criminal pleading, and are in the main nearly similar to those recommended by our criminal law commissioners. To show their application, we here extract an old form of an indictment for murder, and the new form under this Code.



the former. Many more forms are given equally direct and simple in their averments. Surely we ought to be able to say "*Magna est simplicitas et prævalebit.*"

By section 327, "If the indictment be for a felony the defendant must be personally present; if for a misdemeanor only, his personal appearance is unnecessary, and he may appear upon the arraignment by counsel."

And to obviate the necessity of a plea of misnomer, the defendant is to be informed, that if the name by which he is indicted be not his true name, he must declare his true name, or be proceeded against by the name in the indictment. Passing by the motion to set aside the indictment, and the cases when it may be made, we come to the demurrer. The defendant may demur in all cases where the indictment is substantially defective; and by

Section 362, "If the demurrer be disallowed, the court shall permit the defendant at his election to plead. If he do not plead, judgment shall be pronounced against him."

The sections to the 459th embrace the mode of trial, the jury, the calendar of issues for trial, the postponement of the trial and challenging the jury, which contain few, if any, new principles. It is, however, provided by section 460—

"That when the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides without argument, the counsel for the people must begin, and the *defendant or his counsel may conclude the argument to the jury.*"

We are disposed to consider this just. To have the last word is admitted to be an advantage, and nothing is more common in our own courts than for counsel for the defence to decline calling witnesses unless he feels quite sure their evidence will tell greatly in favour of his client, in order not to give the prosecution the reply. We conceive that neither humanity nor justice are satisfied by this—it is an advantage which should be given rather to the accused than the accuser—it must be conceded, by the nature of the case, either to one party or the other. This provision makes part of the French law of criminal procedure, and is said to have in practice the most beneficial effects. The arguments "pro and con" are thus summed up—

"If the reply be given to the prosecutor the ends of justice are sometimes defeated by enlisting the feelings of humanity on the side of the accused. There is in human nature, when not perverted, a feeling repugnant to oppression, which generally supposes power to be wrong, and ascribes innocence to weakness whenever they come

into competition with each other; and few cases give such scope to the imagination to exert itself in this way as that of a criminal on his trial. Squalid in his appearance, his body debilitated by confinement, his mind weakened by misery or conscious guilt, abandoned by all the world, he stands alone to contend with the fearful odds against him; or if counsel be assigned him (supposing him too poor to procure one for himself), he may have, himself a beginner, to enter the lists with one of the highest abilities and standing. If you add to this the decided advantage of the closing argument given to a practical advocate, whom long habit has taught to avail himself of every weak argument or fact, and a zeal in the performance of his duty has taught him to believe it proper that he should do so—do this, and of two opposite effects, one must be produced, both injurious to the fair administration of justice; either the jury will be swayed by the sentiment I have endeavoured to describe, and feel an undue bias in favour of the prisoner, or if this fails to act, the last expression, given with the force of eloquence and professional skill, may in doubtful cases have injurious consequences to the innocent. But give the last word to the accused, and you will do little more than counterbalance the disadvantages inseparable from his situation; while by this show of humanity and disdain of using the power in your hands, you neutralize the sentiments that would otherwise be felt in his favour.”—Liv. C. C. 232, 233.

By section 532, “On the trial of an indictment, exceptions may be taken by the defendant to a decision of the court upon a matter of law in the cases following:—

- “1. For disallowing a challenge to the panel of the jury, or to an individual juror for implied bias.
- “2. For admitting or rejecting witnesses or testimony, or in charging the triers, on the trial of a challenge to a juror for actual bias.
- “3. In admitting or rejecting witnesses or testimony, or in deciding any question of law, not a matter of discretion, or in charging or instructing the jury upon the law on the trial of the issue.”

The bill of exceptions must be settled and signed by the presiding judge.

On the subject of a motion in arrest of judgment there are several sections, and it may be founded on any of the defects in the indictment mentioned in section 355; and the court may also, in its own view of any of these defects, arrest the judgment without motion.

By section 550, “The effect of allowing a motion in arrest of judgment is to place the defendant in the same situation in which he was before the indictment was found.”

The proceedings in judgment and execution are altered no more than is necessary to adapt them to the previous changes

in the Code. We have not space to refer to the subject of Appeals or that of Bail. To the latter just attention has been given, embracing fully the whole subject. The sections relating to it are the 631st to 686th. No unnecessary restrictions are imposed in respect to bail in the lesser class of crimes; and the act provides, that in cases of felony, bail shall not be taken except on ample notice to the prosecution of the names of the bail and their qualifications, with a description of the property in respect to which they intend to justify, and a statement of all incumbrances upon it. The public officers must then inquire diligently and carefully into the sufficiency of the bail, and, if deemed proper, the examination may be adjourned to afford further time for scrutiny.

We feel conscious that we have here given but a very meagre outline of the subject we have undertaken to illustrate; but it may serve to show that many of the abuses of the old practice have in this Code been remedied, and also the principles on which it is drawn up. Our readers will at once perceive that our space will allow no more than this in dealing with a subject spreading over so wide a basis and a Code containing nearly 1000 sections. With this apology for the imperfect manner in which we have grappled with the subject, we leave it to the mature judgment and consideration of our readers.

*R. F.*

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#### ART. VII.—THE BILL FOR THE BETTER ADMINISTRATION OF JUSTICE IN THE COURT OF CHANCERY.

Times Newspaper, 28th March, 1851.

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**A**T the date of our last number we entertained a reasonable expectation that the ministerial propositions for the reforms connected with the various duties of the Lord Chancellor, and the remodelling and reconstitution of the officers and machinery of the highest courts of justice in these realms, would, by the time of this present publication, have been not only fairly before the public, but scrutinised, canvassed—modified, perhaps—and certainly advanced some perceptible degrees towards the form in which they would finally be placed upon the statute roll. We also entertained an expectation, whether reasonable or otherwise, that the ministerial propositions about to be brought forward would be framed, if not so as to effect all the



reforms we would wish to see effected, at least with a full view of all the objects to be desired and of all the evils to be avoided in the present system. Reasonable or unreasonable, these expectations have been wofully disappointed. Events, the consideration of which is totally out of place in these pages, and to which we need not, therefore, more distinctly refer, have so long postponed the period for bringing forward these measures that the proposed bill is not yet printed: leave having only been given on the 27th March to bring in the Bill, which will not have been read a first time until after the recess. And although this disappointment of the hopes we once entertained might be pleaded, perhaps, in bar to any strictures or observations to be made upon the measure itself, yet, in this our own court, we shall not scruple to set aside that plea, and express the further and much greater disappointment we have felt at the nature of the proposed measures, so far as they appear in the speech of Lord John Russell on moving for leave to bring in the Bill.

It is a mockery on the meaning of words to call the proposed alterations reforms. They are, in effect, only two in number: neither of them point at the removal or mitigation of any real difficulty: each of them is a change for the worse. The bill should be intituled, "A Bill for enabling the Master of the Rolls to sit for the Lord Chancellor, and for enabling the Lord Chancellor to act as an Attorney-General in the House of Lords: for augmenting the Patronage of the First Lord of the Treasury: for obstructing the course of Business in the inferior Courts of Equity: and other Matters."

The minutes of the proceedings state that the bill is to be brought in by Lord John Russell, Sir George Grey, and the Attorney and Solicitor-Generals. Popular fancy has exhausted itself in the various forms of expressing the conclusions of popular philosophy with respect to this multiplication of guardians. The very great calf indeed that was suckled by so many cows,—the soup that was spoiled by pleonastic cooks,—the "puddock" that felt every tooth in the harrow,—this unfortunate bill may point to all these figurative existences, and many more, as types of itself. How any one of the four gentlemen above named will reconcile it with his sense of self-respect to advocate an alteration embracing the two points mentioned by the premier, and no other points, remains to be seen. We can conceive many propositions to be made by well-informed minds which we should decline to follow out. We can conceive that many sincere persons, of intelligence superior to our own, might decline to approve of alterations so extensive as we think necessary. But we cannot conceive how any person of ordinary information

on the subject should bring forward the two alterations of Lord John's proposed measure, not as part of a plan, but as constituting the whole plan,—and call that a reform. We are informed, and are ready to believe, that Lord John has been very ill-advised. That may be,—but really this subject has been so often sifted during the last twenty-five years, and by so many hands, that the whole bearings may be mastered, without any very great difficulty, by a mind so ready and so powerful as his lordship's,—and he ought not to be advised at all, well or ill, but judge for himself. The necessary sources of information are not very scattered, nor very hidden. Nothing is less requisite, or, indeed, desirable, than to bring to the task of legislation any practical knowledge of the technicalities of the courts. We do not ask his lordship to collect and consult the oracles delivered by hosts of pamphleteers,—Sybilline leaves, scattered abroad at every breath which rises in St. Stephen's. We do not ask him to recognize the existence of anonymous scribblers like ourselves, much less to place any reliance on our statements. Let him consult Hansard, and the publications of the speakers whose names appear in Hansard, when they have expressed their sentiments elsewhere than in parliament. Let him peruse the statements and speeches of Eldon, Twiss, Lyndhurst, Canning and Liverpool on the one side,—and of Eldon, Lyndhurst, Brougham, Cottenham, Sugden, and, now alas no more, Langdale on the other: with the parliamentary returns of causes, &c., for statistics: all of which he might read in a morning; and we defy him to go down at night and propose such a measure as indicated in his speech of the 27th March last. We appeal, not from Philip full to Philip fasting, but from Lord John fasting to Lord John full: from Lord John uninformed to Lord John after he shall have imbibed somewhat of that ether which inspires statesmen with large and general views. We entreat him, as he values himself, to peruse the speeches of these great men, not merely with the object of quoting their statistics or re-stating their difficulties, but endeavouring to enter into the views of each in his turn, and see matters as the speaker saw them, then digest and reproduce a measure worthy of his name, and of the cause which he has at last deigned to undertake.

For though in the course of the speech to which we have referred the names of Lord Langdale, Lord Cottenham and Sir Edward Sugden are introduced, and the various plans specially recommended by these great authorities are, to a certain extent, discussed, it must strike every reader, even without any previous acquaintance with any of those plans, that they are brought on the stage like the wretched king of the Amalekites, to be dis-

missed to instant execution ; introduced without ceremony, condemned without a hearing, and put to death without mercy or hesitation. Lord Langdale's measure, indeed, meets a somewhat more dignified reception ; but what strikes us as peculiar is the slender reasoning which satisfies the noble reformer in pitching over deeply-revolved and anxiously-matured plans with the same imperturbable nonchalance as if they were filbert husks. Lord Langdale's plan involves the creation of a new officer, a minister of justice ; but the House of Commons are too stingy to grant any new salary ; exit Lord Langdale's plan. One other reason is brought forward against Lord Langdale's plan ; that the minister of justice, being removable, will probably be a less attractive office than the chief justiceships of the superior courts at Westminster, and so the ministry would have an adviser of inferior merit. We do not admit this ; for under the present system the Chancellor and the Attorney and Solicitor-Generals, who are the *ex officio* ministerial advisers, are all removable. Yet, granting it to be so, is it not evident that the whole application of one man of eminent ability (even if he be not the admitted leader in every branch of his profession—who is so?)—will probably be more valuable than the flitting attention of a distracted Lord Chancellor of the present *régime* ? In short, the argument runs thus : Lord Langdale suggests the creation of a high office, with weighty duties, administrative and political, with competent salary and extensive patronage ; but, says Lord John, the House of Commons will not grant the salary, or at any rate I will not ask for it ; and I want the patronage myself ; therefore Lord Langdale's plan will not do, because, without salary or patronage no competent person will take the place. Perhaps not ; but is this mode of argument fair ? Is it even ingenuous ?—Lord Cottenham's plan is dismissed in six lines : it was rejected by a majority of 3 to 1 in the Lords fifteen years ago ; therefore it is useless to discuss it now. Is Lord John not aware of the immense change of feeling since 1836 ? and that of the deepest root, because springing from the diffusion of information and comparison of other systems with our own ? A division on the Corn Laws in 1836, or on a motion for a Corporation Act or Reform Bill in 1826, might be quoted at the present day with precisely the same meaning and force. Sir Edward Sugden fares more ignominiously than Lords Langdale and Cottenham : they are simply executed ; Sir Edward's views are with considerable ingenuity brought forward so as to appear partly to support the measure now proposed. Sir Edward, when proposing his scheme of an Equity Exchequer Chamber, remarks on the weight of responsibility bearing on the Chan-

cellor, from his sitting alone ; and Lord John brings that forward as an authority in favour of his contemplated measure, the real effect of which would be that the Chancellor would never sit at all.

We remember that when, upon the retirement of Lord Cottenham, the seals were held in commission during a somewhat anxious pause, and then delivered to the present Lord Chancellor without any allusion on the part of the government to the question of Chancery Reform, the dissatisfaction which was expressed was allayed by the observation, that by that very appointment ministers at all events now stood pledged to substantial reform, and to a severance of the official functions of the Lord Chancellor—since it was manifestly absurd to contemplate the continuance of all those functions in Lord Truro, as nobody pretended that he could adequately exercise them all, although he might very efficiently exercise some of them. And in the same manner we may point to the measure now contemplated as the most cogent demonstration of the necessity for the appointment of that very officer, call him Minister of Justice, Secretary of State for Affairs of Law, or what else may be thought a proper title, whom Lord John conceives the House of Commons to be too parsimonious to maintain. Would such an officer venture to bring forward such a measure, for which he alone should be responsible? We scarcely think so. If he did, it would be met, and he himself overwhelmed, with the same uncereemonious *huée* as was raised against the late Budget and its responsible contriver. Look at every other department of government ; each is under one head. And as to those which are governed by “Boards,” e. g. the Admiralty and the Woods and Forests, although in each there is an *ex officio* head, yet, unless public opinion vehemently lie, those are the departments in which peculation and mismanagement principally prevail. What are the names to be on the back on the bill? Lord John Russell—worried with a breaking cabinet, recalcitrant Smithfield constituents, suspicious radical supporters, bellowing phalanx of agriculturists in front, auxiliary “Irishes” of uncertain fidelity on his flank, and the Romish Aggression Bill<sup>1</sup> and his Durham Letter pinioning either arm—

<sup>1</sup> The Romish Aggression Bill is another irresistible proof, if other proof were needed, of the necessity for one qualified officer to take charge of the construction of such bills. It is in some parts, grammatically speaking, nonsense ; in other parts redundant ; in other parts, again, so elliptical as to leave the gravest doubts of what would be the judicial construction of the words employed—and this in a penal act. When the acutest counsel now practising at the Equity bar, in consultation a short time since on the effect of the bill, was asked by one of the other counsel present what he considered would be, under certain circumstances likely to arise, the meaning of the only clause proposed to be retained,

we should like to know what attention he can pay to the matter. It is wonderful to us how he managed to make the speech he did. Then there is Sir George Grey, who has not indeed got so many notorious distractions, but who we apprehend may be more usefully employed in matters with which he is better acquainted—the Home Office is usually the busiest in the government. Besides, there are the Attorney and Solicitor-Generals; but these officers are scarce warm in their seats—both of them have been appointed since leave was given to bring in the bill—to the provisions of which the Solicitor-General at all events was not consulted. And yet we cannot help thinking that of all the sponsors he is the most able and willing to do his duty to the measure; and that he would best consult his own reputation and the success of his colleagues by entirely reconstructing the whole bill.

At the risk of some repetition of what we have urged on a former occasion,<sup>1</sup> we shall very shortly state the objects which at this time ought, as we conceive, to be kept in view by those who offer to touch the Court of Chancery as it now stands. Grant that it is a nuisance; but so is Temple Bar, so is the Thames drainage, so are many other things, which yet are not therefore to be yielded to every pottering innovator. If a single stone is to be touched, it must be in part execution of some fixed plan, large enough and secure enough to warrant the interference.

Viewing then with the most comprehensive glance the state of affairs, not only in the old hall of Lincoln's Inn, but all matters connected with the Chancery, we see two courts of supreme appellate jurisdiction, each deciding without appeal, and quite independently of each other, on points of common law, statute law, and civil law; and sometimes, one of these tribunals at least, upon points of law under other codes (e. g. Hindû law), and of international law. This co-existence of two distinct courts of ultimate appeal we affirm to be an evil, as tending to produce uncertainty of law, which can best be avoided by having but one supreme court of appeal.

When we turn our attention to the constitution of these courts, we find them both radically vicious, from exactly opposite defects; for the one, the Judicial Committee of the Privy Council, has no head, and the other, the House of Lords, has, generally speaking, no body; the Speaker very often sitting and deciding,

“What do they mean by that clause?” he replied: “How can I tell?—God in Heaven only knows—God in Heaven only knows! it is the most utter nonsense!”

<sup>1</sup> See L. M. Feb. 1851, Art. III., ante, p. 34.

in fact, quite alone. We further notice that a considerable proportion of the appeals which come before the House of Lords are appeals from the same person, sitting as sole judge in the Court of Chancery, with him who is principal, often sole judge in the House of Lords. So that this so called appeal often is, and always may be, merely an extremely expensive and dilatory way of getting a rehearing before the same judge. And by far the larger number of the remaining appeals come before the speaker, sitting as sole judge, in a system of law to which he is an entire stranger. These anomalies at least are prevented, or as far as possible remedied, in the constitution of the Judicial Committee of the Privy Council. We may further observe that these two courts are of comparatively recent establishment—the Judicial Committee established indeed on a legal foundation, viz., the act of parliament 3 & 4 Will. IV.—the jurisdiction of the House of Lords, founded in mere usurpation and wrong, and first fully recognized in such its usurpation about a century and a quarter ago.

The next object to attract our attention will be the Court of Chancery, presided over, generally with eminent ability and satisfaction (except in the matter of delay), by the Lord Chancellor, whose attention is, however, unfortunately required in ten distinct classes of avocations at once,<sup>1</sup> all of which, it may now be taken as admitted, it is impossible for him adequately to attend to; and who may at any time be removed by matters totally unconnected with his judicial capacity.

Below the Chancellor we see the Master of the Rolls and the Vice-Chancellors, who have likewise been in general eminently successful judges; and the secret of the success and reputation which these judges, who, like the Chancellor, sit alone, have acquired, we cannot help thinking, with all deference to Sir Edward Sugden,<sup>2</sup> is to be found in the fact of their sitting alone. True, this throws a greater responsibility on the judge, and requires more courage and self-reliance; but these qualities, like all others, improve by cultivation, and when matured greatly strengthen and assist the judgment. Courage is as necessary in a judge as it is in a surgeon, or a general, or an engineer. Plurality of judges, if anywhere proper, is so chiefly in a court of ultimate appeal, and there we have them not. That all of them, however, have abundance to do to attend to the business in their own courts, can be denied by no member of either house of parliament, no opposition having been made on this score to the recent Vice-Chancellor's act; which was indeed absolutely

<sup>1</sup> See ante, pp. 35, 36.

<sup>2</sup> Ante, p. 248.



necessary. None of these judges, therefore, can be spared to attend to any business, appellate or original, out of his own court, without a corresponding delay to his own proper business, and corresponding denial of justice to the suitors there.

Lastly, if we look to the state of business and the machinery for administering justice in these the primary equity courts, we find suitors rapidly increasing and the machinery being rapidly made cheaper and more simple, so that the business there is in every way likely to increase; and, therefore, also the business in the immediate court of appeal, i. e. the Lord Chancellor's Court, which is in fact a tolerably regular per centage on the causes in the primary courts.

Turning now our eyes to a subject which at first appears to have no connection with the subject, we shall perceive at the present juncture a grand opportunity. The Lord Lieutenancy of Ireland<sup>1</sup> is about to be abolished, and it is proposed to erect a fourth secretaryship of state for home affairs in Ireland; it being alleged, as the fact very probably is, that the present Secretary of State for Home Affairs has as much as he can possibly lay his hands or his head to; and that he cannot undertake for Ireland in addition. But then it is asked of this fourth secretary of state, what else will he be but a lord lieutenant residing in London instead of Dublin? and the answer seems to be full of difficulties. But if the present duties of the Home Office be materially lightened, and the duties to be undertaken by the contemplated secretary of state for affairs of Ireland be also diminished, it may be that one secretary of state will be able to administer the whole of the remaining home affairs of Great Britain and Ireland; a result greatly to be desired, since it will tend more than almost anything else (except the electric telegraph, or a suspension bridge from Holyhead to Kingston) to amalgamate thoroughly Ireland with Great Britain, as Scotland is now with England, after quite as discontented and turbulent a period of transition. And this will probably be effected if we withdraw from the charge of the Home Secretary all matters connected with the law and the administration of it, and the magistracy and police in the United Kingdom, and place the remainder under one head, appointing a MINISTER OF JUSTICE (whose appointment we have just shown to be desirable on other grounds) to the charge of all the matters thus withdrawn from the cognizance of the Home Department, and to the charge of other matters as well, at present nominally under the care of the Lord Chancellor, but which it would lead us too much into detail at present to point out.

<sup>1</sup> The measure is abandoned for this year, but it must soon take place.

The objects therefore to be aimed at are—1. The establishment of one supreme court of appeal, with a head and a body, without diminishing the working courts of primary jurisdiction, (*viz.*) those of the Master of the Rolls and three Vice-Chancellors. 2. A permanent head to the Court of Chancery, who, in our opinion, should be a single judge. 3. The appointment of a minister of justice, or fourth secretary of state for affairs of law, with the functions here and on a previous occasion pointed out.<sup>1</sup> 4. Further provisions for cheapening and accelerating proceedings in the courts of primary jurisdiction and in the offices connected with the Court of Chancery; much of which might be effected, however, without the interference of the legislature.<sup>2</sup>

Now, which of all these objects does the proposed measure even profess to aim at? Not one. It stultifies the House by asking them immediately to withdraw the Master of the Rolls from that field of labour for which they have so recently and with such haste provided a new vice-chancellor. If three judges were sufficient for that field, why appoint a fourth? If four judges are necessary, how venture to propose to withdraw one? Does not government see how they are exposing themselves to the insinuation of merely endeavouring to obtain the services of a lord chancellor for the salary of the newly appointed vice-chancellor,<sup>3</sup> and of retaining in their services, but degraded to the functions of a mere political hack, that once illustrious officer, the Lord High Chancellor of Great Britain, now to be shorn of his judicial dignity, and of nearly all his patronage and power? Is this the measure put forward in such lofty terms at the opening of the session? and was it fitting to make Her Majesty hope that parliament would “discuss with that mature deliberation which important changes in the highest courts of judicature in the kingdom imperatively demand,” such a measure as this? “The highest courts of judicature in the kingdom” are the House of Lords and the Judicial Committee of the Privy Council. What changes may be contemplated in these we know not; but there is not a syllable concerning them in the premier’s speech of the 27th March, as reported in the morning papers; Hansard has not yet reached that date. And yet changes in these highest courts have been often recommended, and ardently desired, and that by the most eminent

<sup>1</sup> Ante, p. 34.

<sup>2</sup> Lord John Russell, in his speech, refers to general orders in Chancery as if they were legislative reforms.

<sup>3</sup> Since the only new judge appointed is a vice-chancellor—and the proposed measure will certainly withdraw the chancellor from all judicial functions in the Court of Chancery.

legal authorities of the day. So that the speech from the throne at the opening of the session awoke expectations that some remedy would be laid to the root of the matter, instead of reaching only a couple of twigs, and doing mischief there.

Really, it is not only the corporation of London and such like bodies who are unfortunate in their references to that much abused scapegoat, the wisdom of our ancestors. By all means let us profit by their wisdom; where they were right let us do what they did. But on examination it will often be found that while we profess to be following their footsteps, we do exactly what they carefully avoided doing. Thus it is urged that we should retain a cattle market in the middle of London, because our ancestors very wisely placed it outside the inhabited city. So, in the case of the chancellor, our forefathers united all these functions and placed them in the hands of one man for various reasons, not one of which exist in the present day. And those reasons existed up to a very recent period; but a very great change has taken place within the last fifty, nay, the last twenty-five years. When the equity jurisdiction of the chancellor began to obtain, it would have been without doubt resisted and overturned had the exercise of it been confided to any less powerful officer than the chancellor alone. And even in comparatively recent times, there would have been practical difficulties in the way of the severance of his functions, e. g. a scarcity of qualified persons; which difficulties do not exist now. In the days of Lord Nottingham or Lord Hardwick, or even Lord Eldon, there could be no hesitation in naming the ablest judicial mind in England. But at the present day there would probably be considerable difference of opinion in selecting the ablest judge in the country, there are so many of very distinguished merit; but there would be no hesitation in rejecting the Lord Chancellor as not being that ablest judge. By adhering to the system of our forefathers we defeat the very objects which they had in view, and which they attained by that system in their time. Moreover, the duties of the Chancellor have within the present generation greatly augmented: so that what was before an onerous office is now become an impossible one, by the admission of all the Chancellors of the last twenty years. So that, with whatever regret, the severance of his functions must inevitably and immediately be provided for: and that severance too must be real and adequate to afford relief; not, as in the proposed measure is ridiculously put forward, the subtraction of a certain amount of patronage. What can be more unworthy of a man than to waste in vague neniads the time which should be occupied in useful labour?

We know a college Don who objects to railways; says the old posting system was quite fast enough, and so was one mail a day: and accordingly he regularly posts to Cambridge, and his gyp retains the afternoon's letters for the next morning's breakfast table. We know another old lady who still posts between London and Brighton: and on the only occasion on which she trusted herself to the railway, stopped for lunch at Reigate till the next train: it would have been too much to come on all the way at once. Shall imbeciles like these dictate to Brunel and Stephenson, or control the traffic of two hemispheres? Yet this would not be more absurd than if such measures as that now about to be brought forward in the House of Commons should be allowed to pass into law, under the guise of provisions for the better administration of justice in the Court of Chancery.

We are getting tired of this miserable, abortive misnomer; but the indecent assault upon the Chancellor's ecclesiastical patronage must not be passed over without pointing out, that of all members of the government the Chancellor, who generally rises from the middle class of society, and remains long labouring in that class, untainted by party, unspoiled by birth or connexions, is eminently the best qualified to be the distributor of crown livings. Constantly in contact, at college and at the bar, with a large circle of companions, clients and competitors, all his equals, in the honest business of life, it is much more probable that proper cases for promotion will be brought before his notice than before the Prime Minister of the Crown, the great mass of whose petitioners must necessarily have come in contact with him as inferiors, and we are afraid we must add in the most dishonest business of life, general elections. It would open a new and a most infamous and calamitous system of bribery, if the votes of Horsham, Harwich or St. Alban's were influenced by the prospect of the all potent influence of their representative upon the distribution of the cures of souls. Every member of the legislature should set his heel on such a clause—which comes with additional ill grace from the mouth of a speaker, who has just been lamenting the probable difficulty of obtaining an efficient person to take an office to which he dare not venture to affix a salary, but from which he does not scruple to remove the greater part of patronage and power.

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## ART. VIII.—SAUNDERS ON PLEADING AND EVIDENCE.

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The Law of Pleading and Evidence in Civil Actions arranged alphabetically, with Practical Forms, and the Pleadings and Evidence to support them. By John Simcoe Saunders, Esq. Second Edition. By Robert Lush, Esq., Barrister-at-Law. London: Sweet; Maxwell; Stevens and Norton. 1851.

**V**ERY highly as Judge Saunders has been esteemed for the profound work with which the name of Williams is identified, we very much doubt whether his namesake has not left behind him a still more valuable memorial of an acute and laborious mind in the volumes before us. We well remember, in our own noviciate in a pleader's chambers, regarding the then obsolete edition of this work with infinite respect, and being told that it was by far the ablest and clearest exposition of the science we were striving to master, though practically useless by the modern changes, which rendered a new edition essential to restore its utility. That service to the profession Mr. Lush has now rendered with remarkable diligence, talent and success. A more thoroughly practical and complete book does not exist in the literature of jurisprudence. It is a perfect vade mecum for the pleader and advocate. We cannot point out a single want it does not supply as regards either the pleading, practice or evidence involved in a suit at law. It forms almost a solitary exception to our rooted abhorrence of large law text books; for this is no patchwork performance, and indebted in no degree to the scissors and digest.

The object is to present under the heads of action, pleading and evidence, every possible information and guidance which the practitioner can require not only under each generic form of action, but under each species; so that the work answers the same purpose for which originally three or four different works had to be used. It is complete as a text book on civil remedies, and the nature of each kind of action. Secondly, as a work of precedents for pleading under each kind of suit, as well for the plaintiff as defendant; and thirdly, it gives copious and ample instructions for the evidence to support each of them. The following is a specimen of the mode in which this is done, and will serve to show the skilful and yet natural manner in which the subdivisions of each branch are methodised.

The general heading is "Executors and Administrators :"—  
As stated in the preface to the first edition :—

"The arrangement of each separate title is, as nearly as possible, uniformly the same, and wherever subdivision is required is explained by the list of contents at the head of each. Whenever the laws of pleading and evidence have been combined, the arrangement of the title is as follows :—As regards the plaintiff, first, his remedy is described ; then the law which governs the form of that remedy ; next the form itself ; and, lastly, the evidence required to support that form. As regards the defendant, a similar course is pursued ; instructions are first given as to the choice of his plea ; next, as to the manner of framing it ; and, lastly, the evidence required to support it."

"Form of Remedy and their Liabilities.

"Form of Pleadings.

"Declarations.

"Pleas.

"Statute of Limitations.

"Plene administravit præter.

"Replication.

"Precedents.

"Evidence for Plaintiff.

"Of Defendants being Executors or Administrators.

"Of Assets.

"In Action suggesting a Devastavit against Executor de son Tort.

"Evidence for Defendant.

"In Answer to Assets.

"In Disproof of Defendants being Executors.

"Mode of enforcing Judgment."

The concise yet sufficient mode in which the necessary instruction is given may be judged of by the following extract taken from the same chapter :—

**" EVIDENCE FOR DEFENDANT.**

"By R. G. 4 Will. IV. r. 20, in actions by or against executors or administrators, the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered as in issue, unless specially pleaded. The evidence for the defendant with regard to the cause of action differs in no respect from those between other parties. The nonjoinder of another executor as co-plaintiff is only matter for a plea in abatement (1 Saund. 291 ; see 'Abatement'). Payment of a debt to an executor, who has obtained probate to a forged will, is a discharge in an action brought against a debtor by the rightful administrator, on revocation of the probate (Allen v. Dundas, 3 T. R. 125). But a payment of money under a probate of the will of a living person would be void (Ib. 130 ; and see Wolley v. Clarke, 5 B. & A. 744). Where an executor sues on



a promissory note, and lays a promise to himself, the plea of non assumpsit is a denial of the promise so laid, but not of the making of the note (*Timmins v. Platt*, 2 M. & W. 720; *Gilbert v. Platt*, 5 Dowl. 748). The defendant cannot prove that a person other than the plaintiff was appointed executor, &c., or that the testator was insane, or that the will, of which the probate was granted, was forged; for that would be directly contrary to the seal of the ordinary, in a matter within his exclusive jurisdiction (*Noel v. Willes*, 1 Sid. 359; 1 Wms. Executors, 422). But the defendant may show on a plea *ne unques executor* that the deceased had *bona notabilia* in divers dioceses, and that the inferior jurisdiction had no power to grant probate, &c. (ante, p. 1127). A defence, however, that although the probate is valid, the particular debt did not pass under it, must be specially pleaded (*Stokes v. Bates*, supra); and under a plea *ne unques executor*, it may be shown that the supposed testator or intestate is alive, for there the Ecclesiastical Court can have no jurisdiction (*Allen v. Dundas*, 3 T. R. 130); so, that the seal attached to the supposed probate has been forged (*Marriot v. Marriot*, 1 Stra. 761); or that the letters have been revoked (B. N. P. 247). The defendant may plead that he has paid the debt, which is the subject of the action, to an executor, who had obtained probate of a forged will unrepealed at the time of payment (1 Wms. Executors, 424; *Allen v. Dundas*, 3 T. R. 125). On a plea of the Statute of Limitations to a declaration containing only counts on promises to the testator, the plaintiff will not be allowed to give evidence of promises or acknowledgments to himself after the death of the testator (*Sarell v. Wine*, 3 East, 409; *Tanner v. Smart*, 6 B. & C. 608)."

#### "COMPETENCY OF WITNESSES.

"A paid legatee is a competent witness to increase the estate (*Clarke v. Gannon*, Ry. & M. 31). A legatee, who has not received his legacy, is a competent witness for the executor in an action brought against him for demand for mourning (*Johnson v. Baker*, 2 C. & P. 207). A person having an unsatisfied demand upon the insolvent estate of the testator or intestate is not a competent witness for the plaintiff (executor), as he has no means of obtaining any sort of satisfaction for his debt unless the plaintiff succeed in the action, when a fund will be created, out of which he may be satisfied (*Craig v. Cundell*, 1 Camp. 381). In an action by an executor or administrator, for a debt due to the intestate, a creditor of the intestate is a good witness to prove it (*Paull v. Brown*, 6 Esp. 34, recognised in *Nowel v. Davies*, 5 B. & Ad. 371). A creditor is a competent witness for an administrator, to prove due administration by payment of a debt to himself (*Star. Ev.* 776; see *Carter v. Pearce*, 1 T. R. 164; *Davies v. Davies*, Moo. & M. 345; but see Wms. Exors. 1490, n. (t); *Burghart v. Hall*, 4 M. & W. 727, n.; and *Bloer v. Davies*, 7 M. & W. 235, 240, 241). See now 6 & 7 Vict. c. 85; post, 'Witness.'

"In trespass against an administrator for taking goods, one of the next of kin is competent, for the defendant, to prove property in the

intestate (*Thomas v. Bird*, 9 M. & W. 68). In an action for funeral expenses against one not executor, a residuary legatee is competent for the plaintiff, for the reasonable expenses are ultimately chargeable on the estate (*Green v. Salmon*, 8 Ad. & E. 348). So an annuitant creditor is competent to defeat a claim on the assets (*Nowell v. Davies*, 5 B. & Ad. 368; as to the admissibility of a legatee, see *Burghart v. Hall*, 4 M. & W. 727, n.)

“ In an action against the defendant for the value of a horse bequeathed to him by A., A.’s executor and residuary legatee was held, under 3 & 4 Will. IV. c. 42, s. 26, a competent ‘ witness to prove the property in the horse ’ was in the plaintiff at the time of A.’s decease (*Bowman v. Willis*, 3 Bing. N. C. 671; 1 Jur. 262). In an action against an executor *de son tort*, it was held that the widow of the deceased was not a competent witness to support the plea of *plene administravit*, by showing that the deceased had, a short time before his death, executed an assignment by deed of all his property to the defendant (*Yardley v. Arnold*, 6 Jur. 718; 10 M. & W. 141); nor can she be rendered competent by indorsing her name on the record under 3 & 4 Will. IV. c. 42, ss. 26, 27.”

“ *Costs.* ]—By the 3 & 4 Will. 4, c. 42, s. 31, it is enacted, ‘ that in any action brought by any executor or administrator, in right of the testator or intestate, such executor or administrator shall, unless the court in which such action is brought, or a judge of any of the said superior courts, shall otherwise order, be liable to pay costs to the defendant, in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself, and the defendant shall have judgment for such costs, and they shall be recovered in like manner.’ Executors and administrators are now on the same footing as to costs as other plaintiffs, except where the court sees that they have been misled by some misconduct on the part of the defendant, or unless some other very peculiar ground be laid for the interference of the court, and the court would not interfere where the action was brought *bonâ fide* with apparently reasonable grounds for suing, and that the plaintiff was taken by surprise by the defence (*Southgate v. Crowley*, 1 Bing. N. C. 518; *Godson v. Freeman*, 2 C. M. & R. 585; *Engler v. Twisden*, 2 Bing. N. C. 263; see also *Wilkinson v. Edwards*, 1 Bing. N. C. 301; *Prole v. Wiggins*, 3 Bing. N. C. 235). Where the judge makes the order exempting plaintiff from costs, it is final (*Meddock v. Phillips*, 3 Ad. & Ell. 198; but see *Lakin v. Massie*, 4 Dowl. 239). The application should be made before the taxation takes place (*Ashton v. Pointer*, 5 Tyrw. 326; 1 C. M. & R. 738). Executors will not be exempted from the payment of costs under the 3 & 4 Will. 4, c. 42, s. 31, unless there has been a positive and wilful misrepresentation made by the defendant, mere silence as to his intended defence not being sufficient (*Birkenhead v. North*, 11 Jur. 436, Q. B. N. P. C. 188; 9 Law T. 106).

One thing has struck us as being possibly urged against the

completeness of the work, namely, that the very recent judgments are not copiously cited. We have been at the pains of referring to five or six of these omitted cases, and in our humble judgment the omission in each has been fully warranted by the useless nature of the case itself. In each instance the case contained in reality not an atom more than was already decided and recognized as law. In other words, they were cases which the reporters, into whose net all that comes is fish, had served up with their usual profuse liberality in re-cooked fare. We believe, as far as we have been able to observe in so large a volume of matter, that Mr. Lush has given a full supply of all established and useful judgments, with a very proper disregard or probably contempt for the *crambe repetita*, which gluts the "Reports" to the confusion of law and impoverishment of book buyers.

In the Preface to the *second edition* Mr. Lush says, that—

"The original plan has been closely adhered to. Some divisions, however, have been necessarily left out as obsolete, while many more have been introduced; and it is believed that no material omission, either as regards subjects or cases, will be detected. Throughout the work the names of the cases are now given; there are copious headings to all the titles, and a further aid to reference is afforded by a full Index. The New Stamp Act, to which it will often be necessary to refer at *Nisi Prius*, is given at length in the Appendix."

The portion of the work devoted to pleading may probably be more copious than the impending changes and the County Court innovation may hereafter render generally needful. But as long as our present system of jurisprudence lasts (and it will certainly outlive this edition), Mr. Lush would have erred in abridging it. He has, we think, given all that was good in Chitty's, jun., Precedents, in some cases without their defects, and as a text-book of actual law the work is in our opinion quite invaluable, and will prove equally so in the County Court as in Westminster Hall. We need hardly say that we have no other reason for praising this work than that its sterling merit requires it as an act of simple justice at our hands. It has done, and will do, more to extend a practical and clear knowledge of law than any similar book that has appeared for a long time, and we heartily congratulate the profession on the important service Mr. Lush has done it.

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## ART. IX.—MEMOIR OF LORD MONCRIEFF.

THE Judicial Bench has been paying the debt of nature in a striking and affecting manner. It was just this day last year that we discharged the melancholy duty of presenting to our readers the interesting particulars of the life and professional character of Lord Jeffrey, whose loss Scotland had not yet ceased to mourn over, when another light of jurisprudence is there extinguished. Even now, when taking up our pen to pay the lawyer's tribute to the departed worth which Lord Moncrieff's exemplary life portrayed to his countrymen and to all by whom he was known, our hand is arrested by the shock occasioned by the unlooked-for decease of Lord Langdale, whose personal, legal and judicial qualities deserve their well-earned testimony.

It will be remembered that in our Memoir of Lord Jeffrey we made mention of Sir James Moncrieff as the intimate friend and contemporary of that eminent man, and of himself as a gentleman who had attained the highest professional celebrity, and had we not then felt restrained by that delicacy which forbids the indulgence in praise of one yet living among us, we could have said much more of Lord Moncrieff than we did then. But in the case of really distinguished characters, contemporaneous with ourselves, it is perhaps more becoming to chasten the language of eulogy ; for they still live, and living are more eloquent of themselves than could be others who have been accustomed to look up to them as guides and leading stars.

Several notices of Lord Moncrieff have already been published, and we are indebted to the Edinburgh newspapers for the interesting circumstances relating to his personal and professional life ; and were we here to reproduce all that has thus been brought before the public, we feel assured we would not fatigue our readers. But at present we shall confine ourselves to those leading facts which are the more important particulars of an eminent lawyer's career, and which ought in such cases to be the peculiar topics of a legal publication.

The deceased judge was descended from a very ancient Scottish family, Moncrieff of that ilk, whose chief was advanced to the hereditary dignity of Knight Baronet in the year 1626, a title which, after seven descents, devolved upon his lordship's father, the late Rev. Sir Henry Wellwood Moncrieff, D.D., one of the ministers of St. Cuthbert's church in Edinburgh. Sir Henry's wife, Lady Moncrieff, died in the year 1826. By her he had five sons and two daughters, of whom Lord Moncrieff

was the second son, having been born on 13th September, 1776. The eldest son became King's Advocate in the Admiralty Court of Malta, and died unmarried in the year 1813. Sir John Stoddart, the husband of the eldest daughter, was, as is well known, Chief Justice there.

After completing his school education in Scotland, Lord Moncrieff went to Oxford, where, unlike his friend Jeffrey, he went through the regular curriculum, and, we believe, took his degree. The difference in this respect between these two distinguished men may be accounted for by their different dispositions and habits of mind. Jeffrey was of an excitable temperament, and impatient of the even tenor of an Oxford life. It did not satisfy him—he wanted something which he could not find in the English university, and he accordingly left it to pursue the brilliant career by which his name will long be known. But Lord Moncrieff was a man of that steady purpose and laborious industry which the Oxford system is so willing to encourage, and he therefore adapted himself to it without inconvenience, and without any want of interest in the studies which there engaged him.

After leaving Oxford he was called to the Scotch Bar on the 26th of January, 1799, and although it was some little time ere he got into practice, he speedily showed a remarkable talent for legal pursuits, and became one of the profoundest and most learned lawyers of his time. He was essentially a hard-headed legal reasoner. There was nothing superficial about him, for he was never content without searching the depths of argument in every form and mode of its application. To all this he added a singular ingenuity of mind, which made him a most formidable opponent at the Bar. Not content with simply answering the reasoning of the other side, he would heap argument upon argument and adduce illustration after illustration—this too with all the vehement earnestness of the interested advocate; and he hardly ever sat down without tearing the argument of his opponent to pieces—scattering its parts to the winds. He had indeed extraordinary legal power, and was in heart and soul devoted to his profession. Considering jurisprudence the noblest of human sciences, he applied himself to its study with an ardour that is seldom seen now-a-days.

He continued to practise among the general throng of the Bar until 1826, when he was elected Dean of Faculty, and became the acknowledged head of the profession. We believe for many years he was in receipt of one of the largest professional incomes ever acquired at the Scotch Bar. In 1829 he was, on the death of Lord Alloway, promoted to the Bench by

the title of Lord Moncrieff. About two years before this he had succeeded to the family title and estate, Tullibole, by the death of his father. His promotion was highly honorable to Sir Robert Peel, for Sir James was of liberal politics—a determined Whig, who never looked for advancement at the hands of a Tory minister. But his professional claims were in the eyes of the Government so strong that politics were unhesitatingly disregarded, and the learned man who could faithfully administer the law of his country was alone considered.

His lordship became an admirable judge, sustaining on the bench, if not surpassing, the reputation he had gained at the bar. Great integrity of mind, with the clearest view of the just application of legal principle, united with the most patient attention, produced in him an entirely successful development of judicial fitness. In disposing of civil causes, he was remarkable for the skill with which he elaborated everything that bore on the justice of the case. And on the bench of the Criminal Court his demeanour was extremely impressive, whether in charging the jury, or in pronouncing sentence on the criminal. To the last, indeed, he enjoyed all the respect that the upright judge and honest man could desire.

Many circumstances have been related calculated to attract the interest of those who had the privilege of his personal acquaintance; but, in a legal point of view, his cannot be said to have been a life of incident. Confining himself strictly to his profession, the very steadiness of his success at the bar almost necessarily removed him from the influence of the fluctuating tide of public life. We cannot recall any particular chronicle relating to his career as a barrister, if we may except two incidents that as we write occur to us. It was Sir James Moncrieff who, when Dean of Faculty, defended the notorious Burke. The trial was, shortly after its occurrence, reviewed in this Magazine, as a specimen of the manner in which criminal prosecutions are conducted in Scotland. The circumstances under which Sir James appeared for that odious criminal are certainly not without their interest. It has long been the custom at the Scottish bar to appoint “counsel for the poor;” that is, certain of their number whose business it is, among other duties, to defend prisoners who are too poor to retain counsel themselves. In the case of Burke, the gentlemen whose duty it was to act for him, readily applied themselves to the preparation of the defence; but, from the great and serious importance of the case, and in consequence of the public excitement at the time against the prisoner, they felt that, in order to his having a fair trial, it would be necessary for them to have the support of the leaders



of the bar; and they therefore demanded that the Dean of Faculty should himself, along with others of the leaders, take his place among the counsel for the prisoner, and lead the defence of Burke. Sir James Moncrieff, without a fee or any retainer other than that *esprit*, which ought to be the honourable motive to action among our body, readily consented to act; and if our readers will turn back to the Law Magazine of 1830, they will find that we bore witness to the great ability and judgment which distinguished Sir James Moncrieff's speech and conduct of the defence. He was ably assisted by the present Lord Cockburn and others of the then leaders of the Scotch bar.

The other incident to which we allude, was that Lord Moncrieff, as Dean of Faculty, disputed rank at the bar of the House of Lords with Lord Brougham, who then held a patent of precedence. The question was not decided; but it was arranged that the Dean of Faculty should lead, and Sir James Moncrieff accordingly opened and replied for the appellant.

Although an Oxonian, Lord Moncrieff, as might indeed have been expected of the son of the Reverend Sir Henry Moncrieff, ever remained attached to the Scottish Presbyterian Church, in whose councils and concerns he for long took a prominent part. He shared in the discussion which preceded the "disruption" of the Scottish establishment, and took the popular, and what may be considered in Presbyterian polemics the high ecclesiastical side. His opinions were favourable to the views of the party who seceded; and he is indeed said to have advised the passing of the celebrated "Veto Act," an Act, as our readers are aware, which led to the disruption, and all the other ecclesiastical broils from which Scotland still suffers. Lord Moncrieff was one of the judges before whom the famous "Auchterarder Case" was argued, and was among the minority of the bench. His judgment in that case is, among other interesting characteristics, remarkable, if we recollect aright, for having raised a very peculiar question in Scotch pleading. His lordship was of opinion that the plaintiff (the case was of the nature of a *quare impedit*) ought to have set out the Veto Act in his summons, thus putting his case on the law of the Church as he found it; but the majority of the Scotch judges decided that that assumed law was the very question in the cause, that the plaintiff had pleaded well in putting his case broadly on the law of the land, and that the Veto Act could only be relevantly put in issue by the defendant's pleas. We remember that this view was enforced in a very powerful manner by Lords Brougham and Cottenham, when these noble and learned lords gave their reasons for affirming the judgment of the Court of Session.

It only remains to add, that Sir James Moncrieff is succeeded in his baronetcy and the family estate by his eldest son, now the Reverend Sir Henry Moncrieff, baronet, one of the ablest ministers of the Free Church. A younger son, the Reverend George Moncrieff, is a clergyman of the Church of England, and we believe rector of a parish in the diocese of Chester. The second son of the deceased judge, a lawyer by profession, was called to the Scotch bar in 1833, appointed Solicitor-General of Scotland last year, and has just been advanced to the higher office of Lord Advocate, vacated by the promotion of Mr. Rutherford to the bench of the Court of Session, in room of the lamented subject of this notice.

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#### ART. X.—READINGS AT THE MIDDLE TEMPLE.

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Readings delivered before the Honourable Society of the Middle Temple, in the Year 1850. By George Bowyer, Esq., D.C.L., &c. &c. Stevens and Norton. London. 1851.

An Inaugural Lecture on Jurisprudence, and on the Influence of the Canon Law, delivered in the Hall of the Middle Temple, Hilary Term, 1851. By John George Phillimore. Benning and Co. London. 1851.

**D**R. BOWYER says that his principal object was

“to show the connection of the branches of Jurisprudence one with another, and their place in the general system of Moral Science, and at the same time to teach leading principles and classifications, important not only to lawyers, but also to all who are concerned in legislation and government. With these things I have combined a good deal of historical matter and legal learning, which is scattered about in various books, some of them not easily obtained nor usually read.

“In the execution of this task, I have been careful to keep in view what is practical, avoiding vague generalities and mere hypothetical theories, and always citing authorities in support of the chief propositions and principles, so as to enable the reader to test what I have said, and pursue his researches further on any point that he may desire to investigate. And I have endeavoured to illustrate and explain our own national law by means of the greatest legal writers of other countries.”

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“The course of Readings concludes with a general view of the

whole system of the Canon Law, which did not previously exist in the English language."—*Pref.* p. v.

He seems to have achieved this purpose with admirable success. In a plain, intelligible style he has expounded the branches of law he professed to elucidate, in such a manner as to give the utmost amount of useful present knowledge and guidance to future researches of which the limits of his Lectures admitted. Starting with the well-matured design we have sketched, he appears to have pursued its execution, systematically and scientifically, to its accomplishment.

His First Lecture develops the uses of the Science of Jurisprudence, and the Classification of Laws. Then follow these subjects consecutively:—Roman Law, its uses and relation to Common Law: Municipal Law: The Construction of Statutes, which occupies nearly four whole readings; and this is the only part of the course which might have been beneficially abridged: The Boundaries of Judicial Power and Legislative Interpretation: The Criminal Jurisprudence of the Civilians: The Reasons of Laws: A Sketch of Public Law and the Nature of Penal Law. The Course then closes with four very learned and able Lectures on Canon Law. This part of the Readings has the most interest for these times; and as Dr. Bowyer has naturally turned his attention very earnestly to this subject, the result of his researches is the more likely to be valuable. His remarks on that celebrated and important book of the *Corpus Juris Canonici* termed "The Decretals" are so interesting that we extract a portion of them; and of which Dr. Bowyer justly observes:—

"The book of Decretals is superior in authority to the Decree of Gratian, for it is the statute law of the Catholic Church, except so far as it has been altered by subsequent legislation. But we must observe, that many things in the Decretals are not received and admitted by the temporal law of particular countries—such, for instance, as legitimation by subsequent marriage, which was never admitted in England. And the Decretals, as well as the other books composing the *Corpus Juris Canonici*, contain passages, decisions and principles tending to establish the authority of the popes over the temporal civil rights of kings and states; a doctrine contrary to the public law of Europe, and indeed not maintained by the Roman Church, though it has been asserted by individual doctors. There are, moreover, special canons and other ecclesiastical constitutions, customs and privileges belonging to particular churches and places, which differ from the Decretals in matters of discipline. And this code of canons should not be used without reference to the modern text-books, which show how its contents have been modified, amended and repealed, and what portions are still in force."—p. 164.

On the general character of the Canon Law Dr. Bowyer expatiates in his Fourteenth Reading, with reference only to its legal aspect; studiously avoiding any mention of its theological spirit. He treats it as an historical fact in the civil policy of the times, rather than as a component part of a vast ecclesiastical fabric; and in so doing he treats it necessarily in a defective manner; and makes the great mistake of supposing that in so doing he is following the maxim of Savigny, to "regard a system of law in the same point of view in which it was regarded by those who made it." Portions of the Reading, however, trench on a wider and more pertinent field. In speaking of what he terms the "Hierarchy of Jurisdiction," he says:—

"That hierarchy regards the polity and regimen of the Church, which, being a society of men, must have its magistrates and officers for due order and good government, and the fulfilment of its own purpose, as civil societies have. This is evident, for the Church is a society, not of souls only but of men; and it therefore requires an outward and visible polity or constitution.

"The Canon Law regards the Church as a monarchical body, or a body politic in the nature of a monarchy, of which the supreme Pontiff is the head. This body politic, thus fashioned in a monarchical form, has a supreme Parliament called an Œcumenical or General Council, of which the Pope is the head, and a necessary part, as the Crown is of the Parliament in the civil constitution of this kingdom. The Church of the Canon Law unites a federal to a monarchical constitution. It is composed of a variety of ecclesiastical bodies or churches, each of which has its superior bishop, its synod or church parliament, and its peculiar laws, customs and privileges. All these bodies are represented in the Œcumenical Council by their bishops. And they stand respectively in divers relations to the civil communities wherein they exist, and are affected in divers ways by the temporal laws, customs and institutions of those communities. But notwithstanding these local peculiarities, they are all bound together into one universal body by identity of faith, by similarity of constitution, by community of laws, and by their submission to the one supreme power—the Holy See,—which is the centre of their unity and the summit of the hierarchy of jurisdiction.

"Under that supreme power the hierarchy of jurisdiction is continued by a regular gradation of magistrates and officers, the nature of whose functions, and the extent of whose authority, are defined by the Canon Law.

"Thus, patriarchs have the ecclesiastical government of several nations or countries; primates, that of one nation or country; metropolitans, that of a province; and diocesan bishops of a diocese. All these are equal in point of order, for they are all bishops; but one is superior to the other in the hierarchy of jurisdiction. And so the Pope has no order distinct from the Episcopate. But he is su-

preme head of them all in the hierarchy of jurisdiction, of which he alone has the plenitude.

“The remainder of the magistrates of the Church are created to assist the bishop. Such are coadjutors, the diocesan’s deputies and assistants; vicars, who are the bishop’s vicegerents for certain purposes as Vicars Apostolic are to the Pope; archdeacons, who are the bishop’s vicars in their archdeaconry, and are called *oculi Episcopi*; and archpriests, or rural deans. The most numerous and necessary of these inferior magistrates are the parochial clergy, who preside over and have the cure of souls in parishes, which are the smallest territorial divisions of the Church. They have a jurisdiction *proprio jure*, on institution to their cures, by the bishop.

“There are also various offices to which belongs administration without jurisdiction or pre-eminence. Some offices also have a certain pre-eminence or rank assigned to them, and then they are called dignities. Such are different offices belonging to Cathedral and Collegiate Churches.”—pp. 177—179.

These extracts, though less copious than we had wished to make them, will suffice to give specimens of Dr. Bowyer’s style. They who listen to or read him must not expect amusement, or any interest which does not arise from the intrinsic value of the facts he states. His forte is not that of lightening a dry subject; but they who seek for solid and reliable information, carefully collated, methodically arranged, and plainly stated, will be amply recompensed by a perusal of these Readings.

As dissimilar as light from darkness is the character of the Readings delivered by Dr. Bowyer’s successor to the chair.

The entirely different tone as well as style in which the same subject is treated by Mr. Phillimore is most striking. We shall only do justice to the fervid and earnest spirit in which he deals with his subject, and to his remarkable eloquence and fluency of expression, by citing the following passages from his Lecture on Canon Law.

“The first guide of the early Christians—I am expressing no opinion as to points of faith, but merely as to matters of internal discipline and regulation—was undoubtedly tradition.

“It would of course be most improbable that written rules should find their way soon into a society constituted like the early Christian Church, without the sanction, nay, in direct defiance to the authority of the State. Reason and experience show that such a body would adhere with punctilious tenacity, even in things the most indifferent, to habits consecrated in their eyes by many dear and precious associations. The rights and usages practised by those who had been the props and ornaments of the Church in its days of tribulation and adversity, who had instructed their disciples, always at the hazard of their lives, and sometimes at the cost of a torturing and

ignominious death, would be cherished with passionate enthusiasm by their followers, and in some minds be confounded with the substance of Christianity itself. It is also clear that the places where men eminent for sanctity, whether as martyrs or as apostles, had preached and worshipped, would acquire great consideration, and that the successors of such men would be looked upon with no ordinary degree of reverence. Again, the wealth and importance of particular communities, of places like Antioch, or Rome, or Constantinople, would enhance the dignity of the teachers to whom, in these places, the Christian community looked for spiritual advice and consolation. Such, accordingly, was the tenour of Christian societies, and such the principle of self-government which they adopted until Christianity became the religion of the State. The Œcumenical councils were summoned to decide upon controverted points of faith and discipline, and the determination of those councils became the rule of discipline and interpretation to the Christian world.”—pp. 45, 46.

After giving a succinct account of the Œcumenical Councils and the Canons which succeeded them (with frequent mention of the “gross imposture” of the Decretals of Isidore, and the Edict of Gratian), the picture is thus filled up which was left imperfect and untouched by Dr. Bowyer:—

“Thus the Church, at first persecuted, and afterwards encouraged by the State, had at last absorbed it. It was successively the foe, the ally, the sharer, and the engrosser of temporal authority. The Canon Law established a theocracy; but when the machine, constructed with such prodigious art and perseverance, was wound to its utmost stretch, and only the last turn was wanting to it, its springs gave way. The reason and feelings of men shrank from the consummation of the work, which, either as passive spectators or as active instruments, different motives had so long induced them to abet. This was owing mainly to the immutable essence of Christianity, which, founded on persuasion and appealing to the moral nature of man, can never safely rest on violence and persecution: it was owing also, as you will not fail to observe, to the celibacy of the clergy. Frightful and revolting as were the abuses to which this institution led in the dark ages, it undoubtedly saved Europe from the government of a caste. Look at ancient Egypt, look at modern India, you will see the effect of another state of things. The Church was open to all: it was represented everywhere, in the hut of the serf, in the castle of the noble, and in the palace of the sovereign. Though the priest was separated from the State, he bound the members of it together, like the cement which, though different from the stones of the edifice, keeps every one of them in its right position.

“Politically considered, the effect of ecclesiastical codification was to give system and unity to the encroachments and authority of the Church. By the Canon Law and its doctrines, so clearly and distinctly opposed to those of the feudal system, every ecclesiastic be-



came a member of a body guarded by defined privileges, and surrounded by recognized immunities with which no secular authority could interfere. He was governed by laws of his own; he obeyed rulers of his own; he moved in an atmosphere of his own. He was neither a German, a Frenchman, a Spaniard, nor an Englishman, but a priest, and like every other member of the vast body to which he belonged, animated and informed by the mighty heart, every pulsation of which was felt from the centre to the extremities of Europe,—a son not of the mechanic or serf from whom he sprang, but of that terrible and perfectly organized hierarchy which numbered sovereigns among its vassals, and distributed kingdoms to its servants; which took the diadem from the head of monarchs, and placed it below its unsandalled feet; which wielded weapons far more formidable than those which any earthly ruler could command. Ancient Rome was content with a material empire; modern Rome extended her conquests to the mind.”—pp. 68—70.

The spirit of the canon law—in other words, the Roman Church—was so intimately blended with the whole fabric of society, that it is impossible properly to dis sever it from the history of Christendom, either as regards its social economy or its political governments. Mr. Phillimore, who certainly was not under any scruple in dealing with the Romish Church as he deemed right, says on this subject—

“I regret extremely that, without an unreasonable demand upon the attention you are so good as to bestow upon me, I cannot enter, as I had wished and hoped to do, upon the different matters of ecclesiastical jurisdiction—criminal and civil, or show you on what pretexts the clergy appropriated to themselves almost entirely the litigation of mankind. Oaths, usury, heresy, witchcraft, wills, marriages, burials, estates belonging to the Church, were the chief opportunities of which they availed themselves to extend the circle of their usurpations. I must also postpone to another time the account which I had prepared of the origin of tithes, and the detailed history of its territorial dominion. It is not exaggeration to say that, if the clergy had not been plundered in their turn, all France would have belonged to them. Probably two-thirds of Christian Europe have at one time or other been the property of the Church.

“It is easy to conceive the prodigious influence which a body of men, educated like the clergy, would exercise upon every part of jurisprudence in the age of trial by battle and ordeals; when, as Du Cange tells us, under the word ‘Clerici,’ the word ‘clericus’ was applied to every man of learning. So eagerly did the clergy apply themselves to the study of the law, that St. Bernard, writing to Pope Eugenius in the twelfth century, complains of their *devotion to it*: “perstrepunt in Palatio leges non *Domini* sed Justiniani.”

Mr. Phillimore also denounces the “foul and scandalous fantasy” of the system of indulgences, in no measured terms; but,

nevertheless, he is evidently disposed to do justice to the real merits of the ecclesiastical jurisdiction of the Romish Church where he thinks praise due to it. He says—

“To suppose that the power of the Church in the dark ages was an unmixed evil would be contrary as well to philosophical principle as to historical truth. No man is less disposed than I am to underrate the evils of superstition and intolerance, of which ecclesiastical history, down even to our own times, exhibits such numerous and frightful instances; at the same time, however, it is hardly possible not to observe that, as one poison expels another, the evils engendered by ecclesiastical influence, grave and fearful as they were, adverse to manliness and integrity, and menacing to all that makes us what we ought to be, were an antidote to the opposite calamities which the feudal system, the offspring of mere brutal strength and barbarous ignorance had brought down on Europe. The fear of the censures of the Church was a barrier to the ferocity of those savage nobles whom there was no public opinion to control, and no power to terrify; and before her excommunication the noble trembled who would have spurned the law, and the monarch who laid provinces waste for his hunting-ground, grew pale. The Church in those days represented, most imperfectly, indeed, but still it did represent, the best of all aristocracies, the aristocracy of education.”

What follows is too well written to be omitted. It is an homage to Learning, expressed in terms well worthy of the subject.

“In the midst of the gloom and misery, the violence and servitude, in which Europe was then plunged, there was yet one avenue by which the seared conscience and callous heart was accessible, one nerve in the frame of the iron-hearted oppressor and bloody-sceptred tyrant which thrilled at the touch of the low-born and the weak. Abused as it was, prostituted to sordid purposes, and polluted by foul hypocrisy, the power which raised the child of the peasant and the serf above Hohen Stauffen and Plantagenet, which taught the proud humility and the cruel forgiveness, was a grand and a redeeming principle. It saved society from stagnating into despotism; it is the principle which has regenerated and will disenthral Europe: a principle which wrung from the haughtiest and most ignorant of men a reluctant submission to superior intellect and superior education,—a principle which, though sometimes kept down by violence, has an expansive power that, sooner or later, will shatter into fragments every obstacle by which it is restrained: ‘*Quamvis demersæ leges, quamvis timefacta libertas, emergent aliquando*,’—this it is that obliges men in society, nay, that compels the robber in the forest, and the hermit in the cell, to look to other men for countenance and approbation. The fate of Arnold of Brescia, and of many other early reformers, shows that Europe was at this time unable to comprehend a refined and spiritual worship; it was necessary to mix a large quantity of

alloy with the pure gold of truth, to make it current in and serviceable to society. At last so much was mixed that, as we have seen, the coiner lost his credit. But when reason was obscured, and philosophy unknown, after the downfall of ancient wisdom, and before the birth of modern refinement, he must take a narrow view indeed of history who will not rejoice to find mankind acknowledge in theory what they disregard in practice, to see the sword lowered before the crosier, and the rapacious and violent compelled, by the might of public opinion, to do homage to the appearance of learning and self-denial."

Mr. Phillimore's first lecture, on the "Study of Jurisprudence," though very brilliant as a display of genius and rhetorical power, is open to much criticism.

In the first place, it is not a lecture on the study of jurisprudence, nor even a sketch of it, but a series of comments on great jurists, and many people who were not jurists at all, from Justinian downwards. Mr. Phillimore's motto should be the exact converse of

Hors de nous et nos amis  
Nul n'aura de l'esprit,

for his panegyrics are almost exclusively bestowed on foreigners, to the almost constant disparagement of English law and lawyers. Indeed the only Britons he finds it in his heart to praise or even mention as jurists, are Macintosh, *Francis Bacon*, Selden, Hardwicke(!), Mansfield, *Burke*, Bentham, Romilly, and John William Smith. These, we believe, are literally all; whilst Domat, De Thou, Doneau, Du Moulin, L'Hôpital, Vico, Savigny, Giannone and Rousseau, with many others, are pressed into the service of foreign jurisprudence, and held up to us as great jurists! In fact Mr. Phillimore's admiration of philosophers and historians so far transcends his affection for jurisprudence, properly so called, that his praise of jurists usually proportions itself to the degree in which its object derives celebrity from other branches of learning. We believe that were the students who attended his lecture to spend their time, or rather their lives, in the study of the works of those writers the most warmly commended to them by Mr. Phillimore, they would emerge from the prescribed course filled with and fitted for any thing rather than the pursuit of law as a profession. If we err not, we can detect the source of this mistake on Mr. Phillimore's part at the opening of his lecture, in his own definition of what jurisprudence is. He says,

"The subject of jurisprudence, on which I am about to address you, ranks undoubtedly with the most exalted of those that are worthy to employ the human mind and to engross its meditations."

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“ The phenomena of daily life, the passions, usages and habits of social man, are the materials on which legislation operates, and which in their turn react upon legislation. These are not, however, as has been taught by an error as shallow as it is pernicious, the sources of jurisprudence. For them we must look to man himself. Laws are, if I may be allowed the illustration, like the coin which is employed by different communities. The purpose it is intended to answer is common to all, and the substance is usually the same; but the fashion of its shape and the figures stamped upon it vary with the taste and habits of the different nations among whom it circulates. So the material is the same in the Laws of Athens, and the Pandects of Justinian, and the Institutes of Timoor, and the usages which scarcely held together the barbarous tribes that struggled for the vast inheritance of expiring Rome. The means may be different, but the intention is uniform, whether it be written on the reed of Egypt, or painted on the Stoic porch, or cut upon the brazen tablet of the Decemvir, or blazened on the parchment scroll of the feudal lawyer. In every body of social usages, in spite of error, in spite of crime, in spite of superstition, the philosophical jurist will observe those lineaments that distinguish man always endeavouring to enlarge the circle of his experience, reasoning from the known to the unknown, and seeking for analogy where he cannot find demonstration, from the tribes that are compelled to tread the same unvarying round, the very perfection of whose instinct is in truth the badge of their inferiority.”

This, with great submission, is not a definition of jurisprudence, but rather of ethics: and the pursuit thus ably delineated is that of the moral philosopher and not of the lawyer. True it is that jurisprudence, like every other practical science designed for the use of man, must be originally moulded with regard to his character and interests. But the application of such guides to the principles of jurisprudence has been long ago made; and the science now consists in the comprehension and practice of its established rules and laws. Mr. Phillimore's views, strictures and recommendations seem to be applicable rather to the creation of *new* laws than to the comprehension of old ones. He is in fact so ardent a law reformer, that he is in some danger of forgetting that the law is already an established science on a settled system, and of forgetting also that he is addressing a large body of young men who are about to seek a livelihood by its practice as a profession, and who neither can, or ought, to despise the ordinary routine of labour it demands in the accustomed paths. Very, very few can afford to be law *reformers* or *legislators*; and still fewer perhaps would much benefit their generation by the attempt. The following advice therefore, we fear, is far from commendable or pertinent to the avowed objects of the Readings:

“ He, then, that would aspire to a higher character than that of a

mere practitioner, and to him alone would I address myself, must be content to pause in the pursuit of immediate profit, to give 'requiem spatiumque' to his practical activity, while he lays a deep, solid and extensive foundation for the building he designs to raise. If he lose the trivial object of the hour, he will earn the gratitude and admiration of posterity. To suppose that any amount of technical skill or mechanical dexterity will atone for the absence of that range of thought which enlarged study and habits of reflection alone can give, is an absurdity contradicted by every day's experience. No doubt nature has given to some men what art and industry will not enable others to acquire; but I speak not of rare exceptions; and I say that every lawyer who wishes to combine the public good with his own elevation, must study jurisprudence as a science. He must study the nature of man, and the operation of that principle which hopes and fears and thinks and wills within him.

"He must draw his knowledge from the pure and sacred fountains to which every stream of law, however distant, may ultimately be traced; and he must acquire by long, attentive and systematic labour that knowledge of history which will show him in full activity those elements which he has long been accustomed to contemplate in speculation. The desires and passions of man are the hinges on which the gates turn that lead into the sanctuary of jurisprudence, and of these gates Philosophy holds the key."

However directly such studies may lead to "the Sanctuary of Jurisprudence," they will prove a terribly circuitous path to its successful practice. Mr. Phillimore is, however, not long consistent even with his own rule; for though he here points to the "gratitude and admiration of posterity" as the true aim and object of the jurist, and metaphorises (not very happily) the "desires and passions of men" as "*hinges* on which the gates of the sanctuary of jurisprudence turn," yet further on he holds that "the desire of reputation itself is in the eyes of the philosopher but a splendid infirmity." It is usually deemed, on the contrary, the most powerful and wholesome incentive to every good effort, and the germ of the noblest achievements of which our imperfect powers are capable;—the very life-spring of civilization and social progress—without which our virtues would sink into the lifeless piety of a convent, and our best deeds merge into a sullen and isolated fanaticism. If it be philosophy to think the love of reputation an infirmity, the sooner we are quit of philosophy the better. Nor is our admiration of Mr. Phillimore's notion of its promptings at all heightened by the following ably-written denunciation of all practical science and mechanical art, which, we cannot help thinking, would have better befitted a chair in the University of Oxford in the reign

of James I. than a lecture on jurisprudence for England on the eve of the Exhibition of Industry:—

“I own that I look with great indifference on the progress among us of those additions to material comfort, on those appeals to mere convenience and physical enjoyment, to which the attention of the present age (even in places where our youths, instead of being the Helots of routine, should be trained to all that is refined and magnanimous) seems so exclusively to be dedicated. I would sooner live in an age when men wrote like Cicero, and studied Plato, than in one when they invented steam engines and made suspension bridges. The discovery of the lost book of Livy that describes the struggle between Marius and Sylla would be far more instructive to mankind than mountains full of fossils, or libraries of disquisitions upon light; and a play like those of Sophocles or of Shakspeare would, in my opinion, do more to elevate the condition of the species than an electric telegraph from London to Hindostan. At any rate, it is clear that we may safely leave to the propensities of the Anglo-Saxon race all those arts which are subservient to the sordid wants and gross comforts of our animal nature, which tend neither to fortify the judgment, nor to refine the imagination, nor to exalt the heart.”

It is unfortunate for the effect of Mr. Phillimore's views, and their acceptance by his audience, that in this short passage he should have included two of the mightiest agents and most significant types of social and international intercourse as among the arts he deprecates as tending neither to fortify judgment, refine imagination, nor exalt the heart! It would be difficult to name any which have more largely contributed to the immense progress of this nation in moral as well as political welfare.

There is much in this motley Lecture which invites comment, provokes criticism, and commands admiration; but the prevailing feeling with which we close it is one of deep regret, that a man so richly gifted as Mr. Phillimore is with the highest faculties of the head, and the noblest feelings of the heart, should so tenaciously confuse the science of jurisprudence, with a moral philosophy unsuited to the times of activity and enterprise in which we live and to the practical requirements of this people and country.

We have spoken thus frankly, because Mr. Phillimore is capable of doing infinite good in his new post, by simply devoting himself to the exposition of definite branches of what is legitimately jurisprudence. If he will but confine and apply his great powers to any useful subject, or a series of them, he may then, drawing from the copious stores of his well-informed mind, give an interest and charm to the practical elucidation of law which our best lecturers and writers have hitherto failed to impart to it.



## ART. XI.—NEW LAW STATUTES OF THE SESSION.

**W**E propose, under the above title, to insert in this Magazine from time to time articles which will have for their object the presenting in an analytical and explanatory form such of the Statutes passed in the present and succeeding sessions of parliament as relate to the administration of justice, or in any way affect either the practice or jurisdiction of the superior courts of law or equity, or of the various inferior tribunals established in this country.

A mere digest or abridgment of acts, however useful it may be for the purposes of reference, is insufficient for those who desire to obtain an insight into the practical mode of applying the various enactments, or to compare the new mode of proceeding with that which has previously existed in like cases. In order to appreciate fully the extent and merits of any change, it is necessary to have the old practice as well as the alteration presented to the mind, which will thus be enabled to view them in connection with each other, and to judge between them. And this necessity applies most forcibly to matters of legal procedure, in which form is so often essential to the validity of the step taken, and in which an accurate acquaintance with the existing modes of practice is indispensable to the practitioner.

To those of our readers who carry on their business in the country, and are consequently less likely to have access to information upon novel enactments affecting their course of business—but to whom a correct knowledge of those enactments is equally essential—we conceive that such assistance as we propose to offer will be peculiarly acceptable. It usually happens that editions of statutes affecting the different branches of jurisprudence, with notes explanatory of their provisions, are published shortly after such acts have become law; and it is for the purpose of supplying information of the same character at a more early date, that the present series of articles is undertaken. If they have no other effect than that of directing the minds of our readers to the meaning and practical application of those enactments, the knowledge of which is so much required by the legal practitioner, they will not have failed of their object. Until the provisions of a new statute have received a judicial interpretation, it is obviously impossible to do more than give a general explanation of its scope and contents, suggesting doubts where any appear to arise, and pointing out distinctions between the

existing and previous practice where any such seem to be intended.

The present session of parliament promised to be very fruitful in changes of our legal system. The growing dissatisfaction with the delays and expense of the superior tribunals, both of law and of equity, has at length been observed upon in the speech from the Throne, and commissions have been issued to gentlemen well acquainted with the practice of their respective courts, requiring them to examine into and report upon the alterations which appear requisite for adapting the legal and equitable fabric to the wants of the times and the present state of society. It is understood that considerable changes will probably be recommended by these commissioners; but as their labours are not yet terminated, it would be of course premature to speculate upon the nature or extent of their recommendations. Another commission has also been sitting, of which the present Lord Chief Justice of the Queen's Bench is a member—to inquire into the present state of the law of divorce *à vinculo matrimonii*—a subject in respect of which some amendment has been thought to be necessary, but upon which it is extremely difficult to arrive at a satisfactory conclusion. Let us trust however that the experience and energy of the noble lord who is at the head of that commission may be the means of leading to a satisfactory investigation of this important subject, and that, if any legislation should take place with reference to it, it may be as successful as that which simplified and settled the law of real property in accordance with the reports of a commission some years ago presided over by the same distinguished lawyer. While we are upon the subject of real property, we must not omit to mention the bill for a General Registry of Titles, which has been introduced into parliament during the present year, and which if passed into law would work a most important change in the dealings with landed property throughout the kingdom.

The apparent success of the establishment of county courts throughout England and Wales seems to have induced law reformers to imagine that much more extensive powers than at present exist might be entrusted to these tribunals, and we observe that measures are now in the course of progress through the House of Lords, by which it is proposed to transfer to the County Courts many of the functions of the Court of Chancery and of the Masters of that court. Upon this proposal we desire to say a few words. It cannot be denied that, according to the present constitution of the Court of Chancery, delay and expense must be inevitable; the tendency of the system there pursued being to throw vast accumulations of business into the Masters' offices, the matters out of whi

the questions there arise having to be afterwards determined by the judges of the courts in which the causes themselves are to be heard. But it is surely worth while to inquire before, we cast these duties upon another tribunal, whether some mode of supplying and facilitating the decision of equity suits could not be struck out, by which it would be no longer necessary for the judge upon every matter of detail to refer the cause to the Master and afterwards to hear it upon exceptions to his report. It appears to us a vice in the present system, that the ultimate decision does not rest with the person who inquires into the facts; and we cannot help thinking that a more extensive adoption of oral testimony in equity suits would greatly diminish the delay and expense which are now inevitable on such inquiries. It is, we conceive, with some such view that the transfer of these inquiries to the County Courts is advocated by many persons. But while the advantage of such a mode of taking evidence is admitted; we cannot but think that it would be prudent to see whether, by a judicious reformation in that respect, the existing tribunals might not be rendered much more effective, instead of at once having recourse to the clumsy expedient of transferring the same duties, encumbered with the same difficulties to another forum, which, would thus speedily become choked with the multitude of business imposed upon it, and consequently unfit to discharge any even of the offices for the performance of which it was originally constituted. For be it remembered that all the country insolvency cases are now disposed of by the various County Courts, in addition to legal disputes of various kinds up to £50, and if, as proposed, they have besides attached to them a bankruptcy and equity jurisdiction, it seems impossible for them to dispose satisfactorily of all the questions submitted to them. We say nothing as to the competency of the judges of those tribunals: undoubtedly there are those among their numbers who are able lawyers and well qualified to decide the rights in dispute between litigant parties. But we doubt whether there is not a diminution of the confidence felt in these tribunals—a want which will surely exhibit itself more strongly in proportion as causes of greater amount are withdrawn from Westminster Hall and referred to the County Courts. Any one, who looks at the list of complaints entered for hearing at any County Court, must marvel how they can be satisfactorily disposed of in the time, if any of them, as most frequently is the case, involve the examination and dissection of accounts and dealings between the parties. No doubt the returns show that a vast proportion of the complaints disposed of relate to questions in which less than 20s. is in dispute, and which never would have been litigated unless the parties

themselves could have been examined. But at the same time experience shows that many actions involving a balance of less than 20*l.* may require that accounts should be closely looked into, and it is hardly to be expected that plaintiffs will run the risk of losing their costs by suing in the superior courts, more especially as the power which a plaintiff has of *requiring* to be examined as a witness in a County Court will not unfrequently, we fear, cause a dishonest demand to be supported by falsehood. The reports of criminal cases seem to show an increase in trials for perjury in these courts; and it is to be feared that the instances in which it is possible to prove the falsehood of the evidence of the party, are by no means in proportion to those in which it escapes undetected. If this be a result of such a mode of proceeding it is questionable indeed whether the demoralization produced is compensated for by the cases in which justice is obtained by means of admitting such evidence. For these reasons we regret to see an attempt made to render admissible in the superior courts the evidence of the parties to the suit, at least if this power is to be carried to the extent of a plaintiff or defendant being able to require to be examined in his own behalf. This proposition will be found to be by no means so novel as it is generally supposed to be. It was considered by the Common Law Commissioners who sat twenty years ago, and the plan was by them deemed impracticable, and was therefore not recommended. Most of the members of that commission have now been elevated to the Bench; and we have reason to believe that their judicial experience has not altered the opinion which they then formed. So far as giving a plaintiff or defendant a power of compelling a discovery by his adversary, the plan might be feasible and useful; but if it be attempted to carry it further and enable a party to be a witness for himself, we believe that such a course of proceeding will more frequently tend to embarrass than to assist judges and jurors. It is not unusual that a cause at *Nisi Prius* is referred to an arbitrator for the express purpose of having the parties to the suit examined as witnesses, where it appears probable that no other evidence of the transaction can be obtained. But—and we are speaking the opinion of those most conversant with such references—it is the almost invariable practice of arbitrators to compel the parties to exhaust all other means of proof before deciding whether they will permit a party to give evidence in his own favour. The existence of such a discretion in the arbitrator enables him to prevent the substitution of a biassed statement for the evidence of more impartial witnesses. But how is this possible, if no such discretion exists?

Another evil at present existing in the County Courts is the almost entire amalgamation of the functions of the attorney and advocate. Upon this, however, we do not dwell, as, if the experiment succeeds, and causes of any importance are frequently tried in those courts, a remedy will, we cannot doubt, be brought about by the suitors themselves, who will not be content without the assistance of those who have been trained to the duties of an advocate and are accustomed to elicit facts in evidence and to present them in a shape fit for determination. We see that a proposal has been made to divide the County Court into two parts, one for the trial of complaints under 20*l.*, and the other for those of larger amount, in the latter of which barristers should have exclusive audience. It is enough to say that it is hardly probable, in the present state of feeling upon the subject, that such a proposition will be adopted.

Turning from civil tribunals to the criminal law, we may expect to see some useful reforms enacted in the latter branch of the legal system during the present year. Although much has been done of late years to facilitate the administration of criminal justice, instances are yet far too numerous in which the substance of the offence is lost sight of in the technicality of the charge. Take an instance: a servant is sent by his master with a cheque to a bank to get it cashed—he receives the money and appropriates it to his own use—he is indicted for stealing the cheque or the money; but an ingenious counsel proves satisfactorily, by reference to decided cases, that no larceny of either has been committed, because he received the cheque upon a trust, which he performed so far as the cheque was concerned, and because his master never had possession of the money, and therefore could not be deprived of it by stealing. So far, perhaps, the objection is founded in good sense, but it involves only a quibble upon terms. It is admitted that the servant, though not guilty of *larceny*, is clearly guilty of *embezzlement*, an offence which consists in receiving into his possession on account of his master, and not accounting for it. Is then the offence of the servant towards his master or towards society at all different? Ought he, because the technical words of the indictment are not satisfied, to be acquitted, when it is proved that he has substantially defrauded his master, and is criminally liable for so doing? To obviate such plain failures of justice, a bill was introduced last session into the House of Lords, and has been again reintroduced this year, by which it is proposed to provide, that a prisoner who is charged with larceny shall not be acquitted because the evidence proved substantiates, instead of the offence charged, an embezzlement,

or obtaining money under false pretences, and vice versâ; but that he shall be punished as if he had been indicted for the offence actually proved against him. We have observed also with pleasure, that it is intended in the same bill to insert a clause which will have the effect of removing the ambiguity which exists at present as to the construction and operation of the 7 Will. IV. & 1 Vict. c. 85, s. 11, which provides that, on the trial of any person for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such a finding. This clause has, as our readers will doubtless remember, been very recently discussed at great length before the Court of Criminal Appeal, and the several judges have entertained views materially differing from one another upon the effect of the enactment. The majority (eight in number), however, decided that, where upon an indictment for murder, charged to have been effected by blows inflicted upon the deceased, certain assaults by the prisoners upon the deceased were proved in evidence, but it appeared that the death was caused exclusively by one blow inflicted shortly before death, as to which there was no evidence to show that either of the prisoners had struck that blow, the prisoners could not under the statute be convicted of an assault, because the assaults proved to have been committed by them were unconnected with the death; and as a consequence of this opinion, it was held that the acquittal upon the former trial was no bar to a subsequent indictment for assault, in respect of the same assaults.<sup>1</sup> But besides cases of this kind to which the proposed enactment would apply, there are other instances in which a failure of justice no less flagrant has occurred, and to remedy which the legislature should intervene. Take a case decided by the Court of Criminal Appeal during the last year, upon which judges and Courts of Quarter Sessions have been compelled to act, though manifestly contrary to common sense. A prisoner is indicted for stealing 70 sovereigns and 140 half sovereigns, and so on, going through all the possible denominations of coin that could be suggested. It was proved beyond all doubt, and to the satisfaction of the jury, that the sum of 70*l.* was stolen, and that it consisted of some coin, though none of the witnesses could say of which of the precise kind of coin it consisted. It was clear that it included one or other of the denomination of coins stated in the indictment. Upon a case reserved, whether under these circumstances the prisoner could be found guilty, a majority of the Court (one judge only being

<sup>1</sup> See *Reg. v. Bird*, 20 Law J. Rep. (N. S.), Mag. Ca. 70.



dissentient) held that no conviction could take place. Such a conclusion, if it be necessary, is most inexpedient; and to use the words of Mr. Justice Erle, who differed from the rest of the Court, "the rules of pleading ought only to be subsidiary to the making innocence clear and bringing the guilty to punishment; and it is absurd, when it is granted that a felony has been committed, that those rules should have the effect of preventing a conviction."<sup>1</sup> It is certainly most undesirable that any laxity or uncertainty upon points like these should exist in the administration of criminal justice, and that any opportunity should be afforded to great offenders to escape punishment by reason of the obscure wording or imperfect application of a statute. We therefore trust that an efficient removal of these abuses will be effected.

Such then are some of the principal points connected with legal procedure and the administration of justice in respect of which we may expect to find that the legislature has been employed during the present session; and to the acts which carry out reforms of this class we shall at the earliest opportunity after their passing direct the attention of our readers, with a view of analyzing and arranging the several enactments, and of explaining the effect of their provisions, in reference to the practical business of the profession.

There are some other classes of statutes which, as connected—though not so closely—with the practice of the lawyer, of which it will be right to point out more generally the leading features. For instance, any new statute which may be passed for amending the law and practice in respect of Patents for Inventions; a subject in which a professional adviser is frequently consulted, and as to which it is most desirable he should have a familiar acquaintance with any changes in the mode of proceeding.

Up to the present time, the session has been so fully occupied with discussions of another nature, that amidst ministerial crises, debates upon Papal Aggression and questions of Finance, the promised consideration of Law Reform has been greatly delayed, and no act relating to that subject has as yet passed into law. We can therefore in our present Number do no more than intimate our intention of taking up the subject as soon as the materials are provided for us. The preceding sketch of our proposed plan, and of the nature of the expected changes, will serve as introductory to the fulfilment of our design.

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<sup>1</sup> Reg. v. Bond, 19 Law J. Rep. (N. S.) Mag. Cas. 138.

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## ART. XII.—MEMOIR of LORD LANGDALE.

**H**ENRY BICKERSTETH, the subject of this memoir, was the second son of Henry Bickersteth, of Kirkby Lonsdale, a village in Westmoreland, by Elizabeth, the daughter of Mr. John Batty, who kept a spirit store, but had property in the neighbourhood. Henry Bickersteth, the father, followed the calling of a surgeon and apothecary, enjoying a considerable local repute, and being much consulted in emergencies and difficult cases, over a widely-spread district round his surgery. The mother of Lord Langdale, who brought for her marriage portion a small estate situate at Keastwick, a hamlet near to Kirkby Lonsdale, was remarkable not only for her habits of thrift and household management—the peculiar virtues of the county—but for the suavity of her manner, insomuch that tradition relates how the husbands of the vicinity would point her out to their dames as a pattern to be copied, on occasions when the object was to secure a favourable reception to the stranger whom they had asked within their gates. Their eldest son, John, is we believe at present rector of Sapcote, Leicestershire, and rural dean. Edward, the third son, was also in the Church, and rector of a parish, we believe, near Woodstock, Oxfordshire; being of high standing during his life as a preacher and author of sermons and other religious publications, in the interest of what is called the Evangelical party in the Church. Robert, the fourth son, is the eminent surgeon of Liverpool. Two daughters, Mary-Anna and Charlotte, completed the family. In order to increase the means of adequately providing for their children, this worthy couple for several years received into their house, as an inmate, a youth of weak intellects requiring medical attention, the son of a gentleman of some family and wealth, who paid a liberal stipend in consideration of their valuable services. Henry was born at Kirkby Lonsdale, 18th June, 1783, as appears by the parish register, and there seems no reason to doubt was intended originally to follow the profession of his father. He was regularly apprenticed to his father, and served the full time of his apprenticeship; but we do not believe he was ever admitted as an apothecary or surgeon at the Hall or College in London. He was educated at the free grammar-school of his native place, which was at that period in some repute, under the Mastership of the Rev. J. Dobson. Moreover, it is certainly known that he had early attained to some reputation for practical knowledge of medicine and the treatment of disease; inasmuch as,

while yet a very young man, he obtained an appointment to accompany abroad the late Earl of Oxford and Earl Mortimer and his lady and their family, in the capacity of medical attendant; and we know that one or two persons are still living who can remember consulting him in his father's shop so late as the year 1807.

After some time passed in this manner, he was enabled, possibly by means furnished by his noble patron, to enter at Caius College, Cambridge, being then about twenty-one, and therefore several years older than the majority of freshmen. Of his college career no anecdotes have been preserved—all at least that we have to tell is that in the splendid year of 1808 Bickersteth's name headed the honours Tripos as Senior Wrangler and First Smith's prizeman. That splendid year, which from its scanty roll of thirty-eight honourmen in all—scanty as compared with 1851, when thirty-seven men graduated as wranglers, and the lower honours were distributed among seventy-nine more—has given so large a proportion of illustrious names to the world, furnishes also a remarkable example of the unequal lots in life that await those who, the award of the university seems to pronounce, are about to start abreast in the race. The three first names stood Bickersteth, Bland, Blomfield. Eight and twenty years later saw the first married to an earl's daughter, a privy councillor, a peer and Master of the Rolls; the second, known to tiros in algebra as the author of "Bland's Equations"—being then, we believe, as now, rector of Lilley, near Luton, in Bedfordshire, and canon of Wells; the third, Bishop of London, and in the receipt of 10,000*l.* to 15,000*l.* a-year from the see. The fifth on the list is the celebrated Woodwardian, Professor of Geology, Sedgwick, also canon of Norwich. Mr. Bickersteth, immediately upon taking his degree, would appear to have entered at the Inner Temple, and commenced keeping terms, for we find him called to the Bar by that Society in 1811. And now is fully come the day that was to open to him that brilliant career, the object and support and spur of all his academical exertions. But first the state of brieflessness is to be won over—that terrible middle passage of which no one of all who have survived, and all who have sunk under it—ever cares to register the facts; neither its hopes and disappointments, and bitter misgivings and *tædium vitæ* and horrors, nor, in spite of all, in many cases, its gradually bracing and invigorating effects—

“ The shade of youthful hope was there  
That lingered long and latest died,  
Ambition all dissolved to air,  
With phantom honours by his side.”

A share of this experience, and that in not inconsiderable measure, as we should judge, must have been Mr. Bickersteth's portion—at least so far as the non-appearance of a man's name in the Reports denotes the non-affiance of attornies in his skill and learning—that conclusion is nearly inevitable. Even after 1827, when he was made a King's Counsel, and became a Bencher of his Inn, having devoted himself from the first to the equity branch of the profession, and chiefly to the Rolls Court, some years must be passed through until his name can be said to occur frequently in great cases. His practice seems chiefly to have been confined to the Rolls, where he was latterly often opposed to Mr. Pemberton, now the Right Hon. T. Pemberton Leigh. He was not engaged in any reported case before the House of Lords in either of the years 1831, 1832; only once in 1833—twice in 1834, and as many times in the next year, which was the last of his practice at the Bar. Notwithstanding these appearances, however, the value of his practice was probably now become considerable, and at least we may conclude that he felt his footing sure, and that he had permanently established a hold upon life, for on the 17th of August, 1835, he took the step which the prudent barrister always postpones until he has arrived at a fair share of that kind of business which, like the popularity that Lord Mansfield wished for, is not sought but follows; in two words he married. His wife was the Lady Jane Elizabeth Harley, eldest daughter of Edward, fifth Earl of Oxford and Earl Mortimer, his early patron, and a descendant of the ancient family of that name and of Lord High Treasurer Harley. She was thirteen years younger than himself, and the contrast was in other respects sufficiently striking between the inheretrix of that illustrious and time-honoured pedigree set forth by Collins in his history of the name, and the son of his own exertions and high talents. A fact remains to be mentioned, however, which might possibly carry its weight and avail to some extent in redressing the balance in this matter; for it cannot be denied that nature had stamped its own nobility on Mr. Bickersteth's portly frame and massive, manly brow, and finely chiselled and striking features; but however this may be, the contrast was speedily to be lessened, and that in the most effective modes; for in January, 1836, he was sworn a Privy Councillor and made Master of the Rolls,<sup>1</sup> and on the 23rd of the month Letters Patent issued

<sup>1</sup> See *Lords' Journals*, vol. 68, p. 5, showing that these appointments preceded the creation and summons as a peer.

creating him Baron Langdale of Langdale in the County of Westmoreland, with remainder to the heirs male of his body. His writ of summons to Parliament also bore date the same day, and he took the oaths and his seat for the first time on the first day of the Session, 4th February, 1836, as did the late Lord Chancellor as Baron Cottenham. It is said that some surprise was felt in the profession at this elevation. He was now, therefore, to show himself equal to his fortunes, and he instantly showed it, establishing at once and at the first stroke his title to the possession of the highest judicial powers. *Tullett v. Armstrong*<sup>1</sup> is the earliest of his decisions. The effect of it may we believe be thus represented :—A gift of property to a woman for her separate use is valid, though she be single when the subject of the gift vests in her; if she marries, then, (there being a clause providing against assignment by way of anticipation or alienation,) during the coverture she cannot part with the property: upon the death of her husband, however, she may do so, though if she does not part with it during her widowhood, and marries again, the restraint revives; and all this holds although the restraint on alienation is not accompanied by a gift over upon an attempt to alienate. In many respects this judgment is extremely remarkable. For instance, it ruled the point of the revival of the separate estate upon second coverture against two decisions of Lord Brougham;<sup>2</sup> and clashed with opinions of Vice-Chancellor Shadwell and Sir John Leach and other Judges; the judgment was besides at variance with an opinion expressed by Sir C. C. Pepys, Lord Langdale's predecessor at the Rolls, in the case of *Massey v. Parker*. But the curious and probably wholly unprecedented circumstance was, that when the judgment came before Lord Cottenham by appeal,<sup>3</sup> he acquiesced fully in the reasoning of it, frankly renouncing his own former opinion as expressed in *Massey v. Parker*; and the case has been regarded as a leading case ever since.

As regards the framework of the judgment, perhaps it might be taken as a model of what a judgment ought to be, as distinguished from a speech, with argument enough to show why he so thought and to prove him right, but without so much of reasoning as to betray his labour to produce immediate conviction in the minds of his hearers. Then his differences with other judges were stated firmly but modestly, and so clearly, that no

<sup>1</sup> 1 Beav. 1.

<sup>2</sup> See *Woodmeston v. Walker*, 2 Russ. & M. 197; *Brown v. Pocock*, 2 Russ. & M. 210; 2 My. & K. 189.

<sup>3</sup> 4 My. & C. 377, 392, 401.

manner of question was left open as to the precise limits and bearing of his opinion, and the whole was done without a single profession of exaggerated anxiety to do justice, or a protestation of scrupulosity of conscience, or an averment of having read carefully through all the papers half a dozen times, or a declaration of readiness, if the decision did not satisfy the parties, to take them home again, reperuse them, and reconsider the whole matter, all expressed in the most hazy English that ever passed mortal lips—in short, not a drop of Eldonine entered into the composition. Perhaps it might arise from a bias impressed by this early case on his judicial mind, while yet in its plastic state, that the Master of the Rolls ever after exhibited from the bench so marked—it might almost, we believe, be said—so nervous and even fidgetty, certainly, in some cases, so unusual—a care to ascertain and guard the rights of married women; such a proneness to suspect that they were deceiving him or themselves; that they were either cajoled or coerced out of their equities to settlements. Did a married woman swear there was *a* settlement, but *not* comprising the fund in question, his Honour did not believe her; she knew nothing about it; counsel must look into the deed, and declare explicitly what it did and what it did not comprise; and if this were not done in the first instance, his Honour did not fail to reproduce some of his useful experience, and, perhaps, the very instance of it detailed in *Britten v. Britten*,<sup>1</sup> how, upon occasion of a large trust fund becoming divisible, four married ladies swore affidavits that their settlements *did not* comprise four several sums of ten thousand pounds each, and how, notwithstanding, he had refused to make the desired orders for the payment of these sums to the respective husbands, and how, thereupon, he discovered, on production of the settlements, that every one of the four deeds included one of the four sums. So if the fair lady swore there was *a* settlement which *did not* comprise the fund, he was quite sure there was another which *did* comprise it; and so in matters of pedigree and identity of the person, &c., an amount and exactitude of evidence was required at the Rolls which in other courts was deemed almost unapproachable in the present state of human affairs. Nor was this solicitous desire for almost mathematical certainty confined to the cases where large property was in question; on the contrary, arising as it did, not at all from a pedantic attachment to forms, such as might actuate a purist or a martinet, but wholly and entirely from a sleepless intention to secure the rights of parties,

<sup>1</sup> 9 Beav. 143, and see the friendly note of the reporter touching this subject.



and shield them from losses and save undue expense, it perhaps, of the two, was the more vigorously demonstrated with regard to small than to large funds ; at least it is true with respect to funds in court, he could rarely be brought to see any reason why a sum of 50*l.* should be let go on less cogent evidence than ought to be required for the release of as many thousands, and it was very distasteful to him to be pressed, on such occasions, either to forego evidence or to take a cheaper kind in consideration of the smallness of the amount involved. It was quite in accordance with this righteous devotion to the suitor's interest—the object which, giving it but sparing lip service, he still seemed by his unvarying conduct to have vowed “for better and for worse with his body to worship,”—that petition day at the Rolls was always a day of severe trial to the noble Master. Then, if ever, it was that his demeanour denoted the care and anxiety besetting him, not unaccompanied at times with (to say the least) inchoate impressions that counsel and solicitor and client were leagued to deceive and overreach the vigilance of the court, thereby to accomplish some purpose prejudicial to a married woman, an infant, a cestui que trust, or an absent party. In fact, it would be endless to detail instances of his unceasing wariness with regard to petitions, and especially unopposed petitions, and hopeless to attempt painting the labours of his secretary in abstracting them, and impossible to realize the joy with which he discovered some defect or default involving the standing over of a petition, or received the request of counsel for a postponement for further evidence.

All this was very effectual no doubt in many cases to baffle intended frauds, but it is scarcely less certain that in some it only served to increase the petitioner's expenses. Still the balance of benefit was immensely in his favour, and at any rate immeasurably in favour of his mode of transacting this description of business over that pursued in another branch of the Court of Chancery. Step from the Rolls over the way on one of these days when the unopposed list was taken, and you would witness a very different state of management. Whilst in the former court it was even said, and the saying was sometimes acted on, that an opposed petition stood a better chance of being readily granted than an unopposed one, in the latter the usual rate at which uncontested orders were granted on petition was at least forty in the hour—we have even heard the rate stated, on the authority of a sixteen years' constant attendant on that court, at one-half as much again. A prominent and principal feature in Lord Langdale's judicial character was his intense scorn and

disgust at any, the remotest, approach to imposition upon the court; the merest *scintilla fraudis* sufficed to light the fire of his hot indignation; but especially did he lean with the whole weight of his loins upon solicitors who might betray any tendencies in that direction. Such men had but bad times of it with his lordship: indeed, men of quite a different stamp, being solicitors, fared sometimes but little better. Mostly a solicitor could hardly expect to have much more than 20*l.* paid out to him on his own undertaking to apply it properly; mostly a solicitor could hardly expect success for a motion to extend the time for *his* paying money in his hands into court; on the contrary, such a motion was an offence hardly to be forgiven. On one occasion a private communication had reached him—a thing by the way unknown to the Common Law Courts, where, since the days of *Rex v. Wilkes*,<sup>1</sup> no one ever thinks of communicating by letter with the court—that such an application was to be made in a certain case not named. All the sternness that the blindest and most serene of temperaments contained was aroused in him, not however, as might have been expected, at the contempt of the sending of the letter, but at the audacity of the intended applicant. Now it so happened that upon his next taking his seat the first or almost the first business was a motion to extend the time for paying in money—here in exalted tones the court interposed, affrighting counsel: *intonuit dextrorsum*: the fraud was denounced; the solicitor must be sent for; when, after some time spent in this way, at length it was made clear that this was not the case that had been informed against, and that the money was not proposed to be paid to a solicitor at all, and then all again went smoothly as usual, and the Rolls resumed a face of tranquillity and its ordinary aspect of drawing-room decorum, which, the storm being spent, was hardly ruffled when the real case came to be moved. With respect to his mode of despatching the business of the hearings of causes the Master seemed to have taken for his model Sir W. Grant, perhaps the greatest of his predecessors, and perhaps the only one of them whom on the whole he did not far excel. There was the same undeviating attention and the same silent perfect patience, or if ever Lord Langdale went the length of interpolating a necessary question or remark—a most rare occurrence—it was invariably prefaced by the most good-humoured of smiles, discovering the whitest and most perfect of teeth; but it cannot be

<sup>1</sup> 4 Burr. 2562, and compare Lord Eldon's cases, *Ware v. Horwood*, *Erskine v. Gartshore*, and another case, all mentioned Vol. VII. Lord Campbell's *Lives of the Chancellors*, pp. 625—627.

denied that the results of this treatment of the bar were very different in the two cases. Of Sir William it has been said—"few men ventured to exercise a patience which all men knew to be unbounded;" of the last Master of the Rolls we doubt much whether it could be said that his good-humoured spirit of endurance tended in the slightest degree to the close compression of the debate; it rather seemed, we fear, that argumentation grew and repetition was multiplied and fostered by the indulgence they met; at all events, certain it is, however the reasoning might be drawn out with linked dulness, however indulge in endless sinuosities, however return upon itself until it must now and then, we may suppose, have occurred to the mathematical mind of the court to indulge for a moment the question of what equation with what impossible roots would fitly represent a curve of so many isolated points and points of contrary flexure, and until the audience, tired out, gradually wasted away and the day began to wane, yet still Lord Langdale's patience neither wasted nor waned: his powers in this respect were truly wonderful; you may look through whole volumes of Beavan's Reports, and scarce find an interpellation of his noted.

He was an excellent arithmetician, and his love for dealing with figures displayed itself in the careful note he would take of almost every date and sum stated at the Bar; particularly where a balance was to be struck and a conclusion to be drawn upon the difference resulting from two columns of figures, would he show an instantaneous readiness in checking the calculation, delighting greatly when he could prove the processes of subtraction, &c. to be wrong, whether in the pence or the pounds. The result of the whole was this; a marvellous accuracy as to the facts of each case distinguishes his judgments, their general characteristic being, besides the soundness in almost all cases through fifteen years (we believe we may undertake to say) of the law laid down, great clearness arising from great command of language, enabling him to express every principle, with all the qualifications and modifications he attached to it, in such a way that no doubt as to the precise thing meant can ever remain upon the mind of the reader who gives only a moderate share of attention to the case. This high excellence is one which, like Servilius, *nunquam effecisset ipsius Juris scientiâ, nisi eam præterea didicisset artem quæ doceret rem universam tribuere in partes, latentem explicare definiendo, obscuram explanare interpretando; ambigua primùm videre, deinde distinguere, postremò habere regulam, quâ vera et falsa judicarentur, et quæ quibus positæ essent, quæque non essent, consequentia.*

For instances of his signal powers in these respects, we may refer to the long list of cases which he had to decide respecting the rights and powers of railway and other statutory corporations, the difficulty of dealing with which may be estimated from his own words in the House of Lords in February last. "Of a large class of cases of this kind it can hardly be said with truth that there is any law at all, any rule of right or wrong."<sup>1</sup> Many of these decisions will be found to depend ultimately upon the doctrine stated by Lord Eldon in the leading case of *Blakemore v. The Glamorganshire Canal Company*; and others, to be little more than, in musical phrase, variations upon that theme; but in all of them, either the facility with which the rule is adapted to the particular circumstances, or the felicitous way in which it is moulded, or qualified or enlarged to meet the requirements of justice, cannot but be deeply admired. Probably no Master of the Rolls previously settled so many questions respecting so large an amount of property as Lord Langdale did by the decisions we are speaking of.

It remains to glance at his appearances in the House of Lords. These were not frequent; he is reported to have spoken on nine several occasions in the year 1850, which almost equals the number of speeches he delivered during the remaining fourteen years in which he not only sat but was a very regular attendant there, his "general rule being," as he stated on one occasion,<sup>2</sup> "not to trouble their Lordships with any remarks." He never spoke but once in any debate of a political character, namely, in that on *The Protection of Life (Ireland) Bill*,<sup>3</sup> when he supported an amendment mitigating the rigour of the Bill with respect to the offence of being out of doors between sunset and sunrise on the following day. His exertions were wholly confined to improvements in the Law and in the Courts of Equity. His plan for the Reform of those Courts was first broached in the House of Lords, being afterwards published in a separate shape, the only occasion of his printing any thing. In one of the discussions on this subject he stated what will probably startle many persons. He said "Lord Chancellor Jeffries in all the decisions that he pronounced was considered as high authority as a lawyer. No one of his decisions had been overruled since."<sup>4</sup> This is the more remarkable, coming from so singularly accurate a man, because to some extent it is

<sup>1</sup> Vol. 114, *Hans. Parl. Debates*, p. 890.

<sup>2</sup> 4 Aug. 1845, 82 *Hans. Parl. Debates*, 1347.

<sup>3</sup> 6 March, 1846, 84 *Hans. Parl. Debates*, 713.

<sup>4</sup> 34 *Hans. Parl. Deb.* 476.

certainly we submit incorrect; the case for instance of *Knight v. Calthorp*, decided by Lord Jeffries,<sup>1</sup> has never been considered as rightly adjudged.<sup>2</sup> Lord Langdale continued occasionally to address the House on his own class of subjects up to the 7th March last, when he delivered a long, clear and able speech in the debate on Lord Brougham's County Courts Extension Bill, among other matters advocating, in the last words he was to utter there, the propriety of appointing, "under some appropriate name, a minister of justice, whose duty, whilst in office, would be to attend principally, if not exclusively, to this most important of all subjects."<sup>3</sup> With respect to the judicial business of the House, the reader will be surprised to find from the Reports that Lord Langdale does not appear to have attended those sittings more than twice during the fifteen years he was qualified to do so. Both were cases of wills; the first *Allen v. M'Pherson* occurred in 1847, and was decided by their lordships in opposition to his opinion and that of Lord Cottenham;<sup>4</sup> the other was *Trevor v. Trevor* in the same year, when however he did not deliver any judgment, perhaps because he had only attended the second argument.<sup>5</sup> He sat as First Commissioner of the Great Seal in June and July, 1850. His attendances also at the Judicial Committee of the Privy Council were much fewer than has been supposed, from his having of late, as in the *Gorham* case and others, taken a leading part there; besides that case we can undertake to say not more than seventy of his sittings there are reported, the first being in 1841, on the second argument of the great case of the will of Mr. Wood of Gloucester, known as *Hitchings v. Wood*. This sketch, inadequate and feeble as it is, would be still more ineffective in its attempt to do justice to the man, if we omitted to state that all his public appearances, and especially those in the House of Lords, were marked by the sound discretion of his views, by the depth of his knowledge, and by his perfect command of temper. Hansard does not record (we will make the assertion) a single line of his that could give offence to any human being. Accordingly he always was listened to with great attention by the Lords. He had chosen for the motto of his arms the words *suum cuique*, and his whole public life seemed to be occupied in realizing the principle of them, as we believe his distribution of his church patronage while Commissioner of the Great Seal tended among other more important acts of his life to show. His supporters

<sup>1</sup> 1 Vern. 347.<sup>2</sup> See *Powell v. Grigby*, 3 Cl. & F. 103.<sup>3</sup> 14 Hans. Parl. Deb. 1111.<sup>4</sup> 1 H. Lds. 227.<sup>5</sup> 1 H. Lds. 261.

were also chosen with an apparent reference to qualities he sought to make his own. They are thus blazoned. Dexter a female figure representing Fortitude, vested gold, the zone and sandals gules, mantle azure, her exterior arm resting on a Tuscan column proper; sinister a female figure representing Prudence, vested azure, the zone mantle and sandals gules, in the exterior hand a mirror, entwisted by a serpent, all proper. He died at Tonbridge Wells of a paralytic seizure on Good Friday last, having resigned the Rolls only a few days before, and refused the Great Seal some months previously. He was buried April 24, 1851, in the benchers' vault of the Temple Church, hard by the remains of Sir W. Follett, the funeral being conducted with the greatest plainness, agreeably to his own wishes and to the simplicity and absence of parade that he loved in life. He leaves one daughter, Jane Frances, but no heirs male of his body; the title consequently becomes extinct.

*J. G.*

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## Notes of Leading Cases.

### *EQUITY.*

#### INJUNCTION UNDER THE LANDS CLAUSES CONSOLIDATION ACT, 1845, SECTION 68.

The London and North-Western Railway Company v. Smith, 1 M'N. & Gor. 220; The East and West India Docks and Birmingham Junction Railway Company v. Gattke, 2 M'N. & Gor. 155.

THESE cases relate to a subject of great practical importance—the circumstances under which equity will interfere to restrain the owner of lands alleged to be injuriously affected by the execution of the works of a company, from enforcing against the company the summary remedy provided by the 68th section of the Lands Clauses Consolidation Act, 1845. The judgments call for further notice on account of their discrepancy.

Previously to the act the remedy of a party claiming compensation for injuries occasioned by the execution of the works of a company was by mandamus, requiring the company to issue a precept to the sheriff to summon a jury to settle the amount of compensation; and upon the return to the mandamus the preliminary question of the title of the claimant to compensation could, if disputed, be discussed and determined. To diminish the inconvenience supposed to be incident to the proceedings by mandamus, the 68th section of the act provides a summary remedy for parties “entitled to compensation,” enabling them to have the same settled either by arbitration or by the verdict of a jury. If the party “so entitled as aforesaid” desires to have such question of compensation settled by a jury, he is at liberty under this section to give notice to the company, stating the nature of his interest in such lands, and the amount of compensation claimed, upon which the company are either to pay the amount claimed, or within twenty-one days to issue their warrant to the sheriff to summon a jury “for settling the same.” In default, they are liable to pay to the party “so entitled as aforesaid” the full amount of compensation claimed, to be recovered with costs by action. The language of the act gives these summary powers to persons “entitled to compensation,” and the

function of the jury is expressed to be "to settle the amount." Accordingly in the *London and North-Western Railway Company v. Smith* a question arose whether the act applied to a case where the title to compensation was disputed. The defendant in that case, on the allegation that his lands were injuriously affected within the 68th section, had served the company with a notice claiming to be paid 2000*l.* compensation, or in default to have the amount settled by a jury. The company declined to summon a jury, and filed their bill charging that there was no provision in any act of parliament, by virtue of which it could be determined whether the defendant was or not entitled to any compensation, and that such question could not be determined without the aid of a court of equity, and praying that the defendant might be restrained from taking any proceedings against the company under his notice. Lord Cottenham, C., reversing an order of Shadwell, V. C. E., granted the injunction, with liberty for the defendant to bring an action for the purpose of trying his right. In the *East and West India Docks and Birmingham Junction Railway Company v. Gattke*, where the bill was framed upon the model of that in the former case, Wigram, V. C., upon the authority of Lord Cottenham's decision, granted a precisely similar injunction. This injunction has since been dissolved by the Lord Chancellor with costs.

It is true that in dissolving this injunction, Lord Truro disclaimed any intention to overrule Lord Cottenham, and took a distinction between the cases, to the effect that in *Smith's* case the title to compensation depended upon a mere question of law; whereas in the case before him, if the defendant had in fact sustained damage from the causes alleged, he was "entitled to compensation." But it is impossible to examine the two cases at length without coming to the conclusion that the discrepancy is not confined to the facts, and that the Chancellor's argument is in many respects directly and intentionally at issue with that of Lord Cottenham.

Lord Cottenham's argument was briefly this:—The court, in the exercise of a very proper and wise jurisdiction, and one clearly within its power, had interfered against companies, and ought to interfere against the public, so as to keep all parties within the powers which these and similar acts conferred. This act had given powers which might be exercised so as to be most stringent and oppressive towards companies, who might be compelled by any claimant having a perfectly unjust claim to go before a sheriff's jury, or to be fixed with the whole sum claimed. The law, as it stood before the act, provided means for determining the question of right to compensation first, and

afterwards the question of amount. Then came the act, which to correct a supposed evil created a much greater one, by reversing this order of proceeding. This state of the statute law alone would be quite sufficient to justify the court in interfering by injunction. The injunction was asked on the ground that the party enforcing the act did not fall within it. The court would interfere to have this question, which was one of law, determined, and for that purpose would place the company in the situation they would have been in if they had applied to the Court of Queen's Bench for a mandamus.

Lord Truro does not deny the jurisdiction of the court "to keep all parties within the act;" but he denies that a party, whose title to compensation is disputed, is therefore excluded by the act. So interpreted the act had nothing anomalous in its principle. It was incident to every common law complaint of injury and damage, that the existence of the injury, right to compensation and the amount of the damage alleged to have been sustained, are tried and decided in one proceeding and upon one trial. The requisition of a precept in this case was analogous to the commencement of an action; and upon execution of the inquisition it was competent to the tribunal to decide upon the question, whether any injury within the meaning of the act had been inflicted by the company, and whether any damage had been sustained in consequence. . . . . It had been assumed in the argument that the jury had no jurisdiction to decide upon the question of right; but during the many years that compensations have been assessed—ever since the passing of the London and West India Docks Act, fifty years ago—questions upon the construction of the compensation clauses had constantly arisen before the Recorder of London and other presiding officers, and of necessity they had been decided by him and the jury. The jurisdiction of the jury had been frequently recognized (*Reg. v. The Lancaster and Preston Railway Company*, 6 Q. B. 759; and *Reg. v. The Eastern Counties Railway*, 3 Railw. Cases, 466; and 2 Q. B. 347). The assumption therefore that the jury had no jurisdiction to construe the act upon the point, whether the claim made was within its provisions, was founded in mistake. Then as to the supposed inconvenience of the course prescribed by the act,—the principle of Lord Cottenham's decision, if extended to this case, would subject the claimant (however small the claim may be) to a suit in chancery, in which the question involved is admitted to be a question of law, which the court ought not to decide, and for this court to send the party to a court of law for decision by an action. The proceedings of this court are liable to appeal to the House of Lords,

when, if the party succeeds in his appeal, he gets no costs. The action is subject to a bill of exceptions, to a writ of error in the Exchequer Chamber and to the House of Lords. The delay by such a course of proceeding cannot be predicted; and if in the result the case be determined in favour of the claimant, he has then to commence the prosecution of his compensation; and all this is brought upon the claimant by an attempt on the part of the legislature to protect him from delay and expense. The interest of the claimant is expedition, that of the company delay; and the company, by making an example of one claimant, would unquestionably succeed in deterring many others from advancing their claims.

The title in Gattke's case depending solely upon a question of fact, it may be doubted how far Lord Truro's judgment, so far as it applies to a claim raising mixed questions of law and fact, might be considered extra-judicial. It is clear, however, that to such a case the principle of Lord Cottenham's decision would not now be extended, and that an injunction would most probably be refused in any case except where, as in that of Smith, the title to compensation raises a mere question of law. The Chancellor's judgment is further important, as indicating his intention to construe this and similar acts of parliament "liberally in favour of the public, and strictly as against the company."<sup>1</sup>

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<sup>1</sup> It may admit of question, whether these bills might not have been successfully met by a demurrer, for in each case the defendant's title to compensation was denied by the bill.

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#### TRUSTEE—SOLICITOR—PROFESSIONAL CHARGES.

*Cradock v. Piper*, 1 M'N. & Gor. 664.

LORD COTTENHAM's decision in this case has defined the limits of the rule, which in general deprives a trustee, being also a solicitor, of professional remuneration.

The history of the law on this subject is briefly this.

Lord Hardwicke states it to be "an established rule, that a trustee, executor or administrator, shall have no allowance for his care and trouble; the reason of which seems to be, for that on these pretences, if allowed, the trust estate might be loaded and rendered of little value;" *Robinson v. Pett* (3 P. Wms. 251). Moreover, it is the duty of a trustee to protect the interests of the estate, and if allowed to transact the business of the estate, and then to claim compensation, his interest would

be opposed to his duty, and as a matter of prudence the court will not allow a trustee to place himself in that situation. And the rule is laid down by Lord Cottenham as being absolute and not dependent upon the facts of the particular case:—"It is not because the trust estate is in any particular case charged with more than it might otherwise have to bear, but because the principle, if allowed, would lead to such consequences in general." (*Moore v. Frowd*, 3 My. & Cr. 50); and by Alderson, B., "It has been said that the party in this case is respectable; it may be so, but it is in order that parties may be respectable that they sustain the loss." (*Fraser v. Palmer*, 4 Y. & C. 518.) Such is the general rule and the principle on which it is based. In *New v. Jones* (6 Leg. Obs. 410), Lord Lyndhurst, C. B., applied it to the case of a solicitor:—"In point of prudence and propriety, and as a guard over the estate, I am of opinion that it would not be proper that a solicitor who was a trustee should be distinguished from an ordinary trustee. If a trustee, who is a solicitor, acted as a solicitor, he is not entitled to charge for his labour—he is entitled only to be paid his costs out of pocket." In *Moore v. Frowd* (3 My. & Cr. 50), the instrument creating the trust directed that the trust monies should be applied (*inter alia*) in payment of all expenses, disbursements and charges to be incurred, sustained or borne by the trustee, "either in professional business, journies or otherwise;" and that the trustee might retain all reasonable costs, charges and expenses which he might sustain or be put unto, such costs, &c. to be reckoned, stated, and paid as between attorney and client. But even these terms were held by Lord Cottenham insufficient to exempt the case from the application of the general rule. These provisions contained nothing peculiarly applicable to the case of the solicitor being also trustee. It could not, therefore, be assumed that the intention was to provide for some other mode of dealing with that union of characters than what the law would have enforced. In *Collins v. Carey* (2 Beav. 128), Lord Langdale, M.R., applied the same principle to business transacted by a solicitor's firm in which a trustee was a partner; and in *Christopher v. White* (10 Beav. 523), to a similar case, although the business was transacted by a partner who was not a trustee, "for the business was done for the trustee's profit as partner, and the court would not allow a trustee to say to his partner 'You shall act as solicitor and earn all the profit you can for the concern.'"

So far the rule was clear; but it was still an open question whether it extended to the case of a trustee employed and acting as solicitor in behalf of his *cestui que trust* or of his co-trustees. In *Carmichael v. Wilson* (2 Moll. 537, and 2 Dow. & Cl. 51), and in *Fraser v. Palmer*, a distinction had been taken in favour

of a solicitor so employed ; but until *Cradock v. Piper* the point was not considered as decided.

In *Cradock v. Piper* one Watson had acted as solicitor in several suits relating to a trust estate of which he and three others were trustees—in one suit as solicitor for the plaintiffs, the trustees—in others for cestuis que trust who were defendants, and also for himself and his co-trustees who were also defendants. The Taxing Master disallowed the costs claimed in all these relations. Upon a petition by Watson, complaining of this decision, and praying that the taxation might be reviewed and the several charges allowed, Shadwell, V.C., referred it back to the Master to review his report. From this order the cestuis que trust now appealed. The policy of extending the rule as a security against abuse was a strong argument; a trustee, being also a solicitor, was likely to have extended to him the exclusive management of the trust property, and might, therefore, have discretionary powers to institute, frame and manage suits—a discretion too likely to be influenced by the profits which might accrue to him in respect of costs of other parties for whom he might act, as of his own. On the other hand, any such rule might easily be evaded; a name was easily borrowed, and practically the supposed security would not be very effectual. Lord Cottenham, in giving judgment, noticed these arguments, but declined to determine the case before him with reference to the question of policy. It was the duty of the court, he said, to ascertain whether the rule had been so extended, rather than to speculate upon any advantages which might be thought likely to arise from its extension. The rule was that a trustee should not make his office a source of remuneration—but was acting for other parties any part of the office of a trustee? If A. is a trustee of a fund, and employs himself, this is clearly within the rule; but it is not the same thing if there are other parties and they come and employ him, though this employment may arise incidentally out of his being a trustee. So far as the cases of *New v. Jones*, *Moore v. Frowd* and *Carmichael v. Wilson* extended, the rule as laid down and acted upon was confined to cases in which the business of the solicitor was the proper business of the trustee, but it was no part of the business of a trustee to assist other parties in suits, and to such cases, therefore, the rule, as hitherto laid down, did not apply. In *Fraser v. Palmer* the distinction had been taken and properly dealt with. There the trustee was allowed the costs of the suit in which he acted as solicitor for others, and disallowed the costs of the suit in which he acted for himself. “I am therefore of opinion,” concluded his lordship, “that the rule does not



extend beyond costs of the trustee where he acts as solicitor for himself, and that with this declaration there must be a reference back to the master to review his taxation."

The practical result, about which considerable discussion arose, was afterwards thus explained by Lord Cottenham:—"What I have already decided is simply, that, so far as the solicitor being a trustee had costs of his own, the well-established rule, that he ought only to have costs out of pocket, ought to prevail. I stated, however, my opinion, that where he acted for the others it was no longer an acting in the character of trustee, and that he was not precluded from acting as solicitor, though he was trustee of the fund. The result is, that the costs of the parties for whom the solicitor appeared, and for whom he had a right to appear, and for which appearance, according to the rule I have laid down, he has a right to receive full costs, ought not to be diminished by the circumstance of his being a party associated with them, *that association not increasing the costs of the client*. I think, therefore, that in taxing the costs of the parties where he is one, he must be allowed the costs as if he was not a party himself. I assume now, that upon looking into the bill of costs, it does not appear that any portion of it is for costs which have been occasioned by the solicitor appearing for himself independently of other parties."

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#### DISCOVERY AND RELIEF—DISCOVERY IN AID OF PLEA OF IMMORAL CONSIDERATION—PENAL CONSEQUENCES.

Benyon v. Nettlefold, 2 M'N. & Gor. 94.

LORD TRURO's judgment in this case has reduced the practice in courts of law and equity, relative to contracts founded on an immoral consideration, to some degree of consistency and intelligibility. It has also removed the confusion between Discovery and Relief occasioned by the judgment of the court below, noticed in a former volume of this Review.<sup>1</sup>

It is a well-established principle that a bond or other instrument for an illegal consideration is void at common law *ab initio*. "It is void," says Wilmot, C.J., in his celebrated judgment in Collins v. Blantern (2 Wils. 349), "*ab initio* by the common law, by the civil law, moral law, and all laws whatever . . . . and the reason why the common law says such contracts are void is for the public good—you shall not stipulate for iniquity." For a time it was attempted to evade the effect of this

<sup>1</sup> Law Mag. vol. xlii. 308.

rule by concealing the unlawful consideration, and so framing the instrument as to be good upon the face of it, the effect of which, coupled with the maxim that the law will not endure a fact *in pais dehors* a specialty to be averred against it, and that a deed cannot be defeated by anything less than a deed, was for a time supposed to be that the instrument was valid. This reasoning, though maintained in argument in the Court of Chancery as recently as the date of the case before us, was disposed of by Lord C. J. Wilmot as early as 1767. "The bond never had any legal entity; and if it never had any being at all, then the maxim that a deed must be defeated by a deed of equal strength doth not apply to this case. The law will legitimate the showing it void *ab initio*, and this can only be done by pleading . . . . If this wicked contract be not pleadable, it will be good at law, be sanctified thereby, and have the same legal operation as a good and an honest contract, which seems to me most unreasonable and unrighteous; and therefore, unless I am chained down by law to reject this plea, I will admit it, and let justice take place." We give this sentence entire, because the line of reasoning applies no less to the case which we shall next have to consider. It might well happen that there would be no evidence in support of such a plea as that in *Collins v. Blantern*, except what could be obtained from the party putting the bond in suit; and if equity would not aid in obtaining a discovery of such evidence, the rule for its admission would be inoperative. Would equity, in such a case, interfere, upon the principle enunciated by Lord C. J. Wilmot, and "let justice take place?"

This was the question in the case before us. By a deed, which was good upon the face of it, Benyon covenanted with Beavan and Wm. Nettlefold, the father of Caroline, to pay them an annuity in trust for Caroline. The trustees brought an action on the covenant against Benyon, who pleaded that the deed was in consideration of future illicit cohabitation between himself and Caroline, and filed his bill against the trustees for discovery in aid of his plea. Wm. Nettlefold put in a general demurrer to this bill. Shadwell, V. C. allowed the demurrer, on the ground that it was clear, from the language of the bill, that the plaintiff had participated in the evil which the deed was intended to produce. Upon this ground, Lord Langdale, M. R., in *Batty v. Chester* (5 Beav. 103), had refused relief, and *there was no substantial distinction between relief and discovery*. Technically speaking there was, *but the principle was the same: the very principle which would restrain the court from giving relief was a principle that would also restrain it from giving discovery*.

This confusion between relief and discovery opened a door to all the evils (not to mention others) which it had been the policy of the law, as above stated, to exclude. For it was plain that, by concealing the real nature of the consideration from third parties, those claiming under the covenant or bond might in all ordinary cases maintain the very actions which it had been so long the policy of the law and the study of the courts to discountenance. Accordingly, the plaintiff appealed to the Lord Chancellor, who overruled the demurrer.

In reversing the judgment of the Court below, the Lord Chancellor went upon the broad ground of the distinction between bills for relief and discovery. However similar they might be, yet there was in many respects a clear distinction between discovery and relief, and among others was that with which he had to do in the present case. The defendant here was seeking to keep from the court of law facts which the plaintiff in equity alleges are necessary to his defence, and *necessary for a court of law to know, in order to a due performance of its duty*. All the cases showed that, though a bill for discovery and relief founded on such a contract might have been demurrable, yet to a bill for discovery alone a demurrer would not lie.

There were, in fact, but two grounds upon which the demurrer could be supported; that it was against public policy to give immunity (which would be the effect of discovery) to the seducer; and that the discovery might subject the defendant to penal consequences; for, it was contended, a person who became a trustee under a deed, the object of which was to secure future illicit cohabitation, although the woman might not be, as she was in this case, his own daughter, is guilty of an offence against public decency, for which he might be prosecuted criminally. With respect to the first ground, his lordship said, "It must be remembered that *the law in sanctioning such a defence does not do so out of favour to the party urging it, but on the grounds of public policy, viz., that those who violate the law must not apply to the law for protection.*" As to the second ground, the court was of opinion that there was in the bill no allegation as to which the defendant by answering could subject himself to any penalty. The case was that of a bond given to a trustee for a woman, the transaction being an arrangement with the woman for future illicit cohabitation, and the woman, by her trustee, now seeking to enforce the bond at law. "Even if the trustee knew the real nature of the agreement upon which the bond was given, who can say, that being a trustee under these circumstances would expose him to any penalty?"

## COMMON LAW.

## MARINE INSURANCE—TIME POLICY—IMPLIED WARRANTY.

Small v. Gibson, 20 Law Jour. Q. B. 152; S. C. 15 Jur. 325.

EVERY contract of insurance assumes that the assured, in addition to the express warranties contained in the policy, tacitly warrants the existence or performance of certain facts or things, more particularly within his knowledge or power, as the basis upon which the contract is to stand. It imports, where entered into for a particular voyage, that the owner of a ship which is reasonably capable of performing it shall be indemnified against certain contingencies which may happen in its course; and the existence of this reasonable capability, shortly termed seaworthiness, is not only a thing warranted, but a condition, failing which the contract fails altogether. Now it is settled that, in an insurance for a voyage, this implied warranty requires that the ship proposed to be insured should be seaworthy at its commencement, or in port when preparing for it, or that it should have been so when the voyage commenced, in case it is already at sea. As in these cases the risk is commensurate with the voyage, this condition or warranty is by some writers represented in a compendious, though not quite accurate way, as applying generally to the commencement of the risk in all cases, both of policies for voyages and for time; between which it seemed to be assumed that in this respect there was no distinction.

The present case is, however, the first judicial decision of the point. A ship was insured from the 25th of September, 1843, to the 24th of September, 1844, and lost between those days. The assured brought an action on the policy; and an issue, raised by a plea that the ship was not seaworthy at the beginning of the risk, was found for the defendant. A rule for judgment *non obstante veredicto*, was discharged by the Court of Queen's Bench, but that decision was reversed by the Court of Exchequer Chamber, who held, in the first place, the warranty of seaworthiness to be an implied one, and not to arise, according to an opinion attributed to Lord Abinger, from the word "good" in the description in the policy, "the good ship," which, as it occurred here, would have obviated all question if the warranty were an express one. The court then proceeded to show that the cases which had been considered authorities (*Hollingworth v. Brodrick*, 7 Ad. & Ell. 40; *Dixon v. Sadler*, 5 M. & W. 405) did not establish the proposition, that the law implies in time policies a warranty of seaworthiness at the commencement of

the risk. Indeed, Mr. Justice Patteson, whose dictum in *Hollingworth v. Brodrick* is usually cited in support of it, at the end of his judgment in that case lays down the broad principle that no warranty of seaworthiness is to be implied, except at the commencement of the voyage.

Then, admitting that there is no question in the case of a voyage policy, but that there is an implied warranty or condition of seaworthiness at the commencement of the risk, that is, at the port where the insurance is "at and from;" at the beginning of the voyage where it is 'from' a port, it is observed, that in such case this condition is highly reasonable, where the assured knows the situation of his ship, and is capable, by himself or his agents, of performing the condition by putting the ship into a state of proper repair and fitness for the voyage.

But in the case of a time policy, is there such an analogy to that of a voyage policy as, in the absence of decision or authority to that effect, to make it involve a condition of seaworthiness at the time the risk begins? The court thought not, and proceeded to distinguish the two cases as follows. In the case of a time policy the assured does not necessarily know the condition of the ship at the commencement of the term. She may be at sea in a good or bad condition, and, if at sea, no care or expense on the part of the assured or the agent can secure her being seaworthy then. The sudden loss of a yard, or sail, or rudder, might have taken place without the possibility of the assured having been able to replace it; she might have met with damage by the sea which it would have been impossible to repair; she might have lost two or three of her crew by a malignant fever—circumstances which render it essentially different from the cases of an insurance on a voyage, when it is always competent for an assured or his agent to put the vessel into a seaworthy state when the policy attaches. It is very reasonable to hold in the latter case that the assured warrants the seaworthiness of the ship, *which he is presumed to be capable of securing*. In the former case, it is unreasonable to make him responsible, under all the circumstances of the case, for the seaworthiness of the ship, which, under many circumstances, he could not possibly effect. *It is a strong argument against any implication of the warranty, that the thing warranted is not within the power of the party supposed to warrant it.*

The point decided is confined to this, "that there is no ['not a'] warranty of seaworthiness wherever the ship shall happen to be, and in whatever circumstances she is placed, at the commencement of the term of insurance." It is by no means decided that no warranty of seaworthiness at all is im-

plied in a time policy, or that it is not the same as in a voyage policy, "according to the situation in which the ship may be at the commencement of the term . . . if the ship be at sea, that she was seaworthy, when that voyage commenced." In short, that the obligation on the assured is just the same in a time policy as if the service in which the vessel was, or was intended to be engaged, or might be engaged in during the term, was inserted in the policy.

It seems to be pointed out as a rule, that the measure of the obligation of the assured is what he is capable of performing; and, therefore, that there may be a warranty of seaworthiness at the commencement of the risk, so far as lies in his power to effect it. Thus, the policy would not attach if damage previously sustained had not been repaired, when it might have been by the exercise of reasonable pains. And it clearly would not, if any one insured a ship then on a voyage, and known to him not to have been seaworthy at its commencement; so that this decision offers no inducement for concealment.

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**PARTNERS IN TRADE—MANUFACTURERS—JOINT PROPERTY—SURVIVORSHIP.**

*Buckley v. Barber*, 20 Law J. Exch. 114.

THE case of partners in trade forms an exception to the right of survivorship, which is an incident of the joint possession of a chattel as well as of the joint tenancy of real property. This maxim, "*Jus accrescendi inter mercatores locum non habet*," is established beyond doubt, but it is also settled that as far as applicable to real property and to choses in action, it exists only in equity. Until the present case it was not quite clear that the exception was at all recognized in courts of law, even in cases where it was sought to be applied to chattels in possession. The principal authorities for confining the operation of the maxim altogether to equity consist of an expression of Lord Tenterden's to that effect, in the case of a ship (*Law of Merchant Ships*, 8th ed. p. 97), and of the inferences to be drawn from one or two dicta of equity judges, which were however susceptible of being explained, as said of choses in action. On the other side, in *Co. Litt.* 182 a, and *Noy*, 26, n., it is said that there is no survivorship among merchants; and although it is laid down generally as equally true both of chattels in possession and choses in action, that was not because it was intended only that it was so in equity, but because the maxim was then supposed to apply to



both: there were also several dicta, one as far back as 38 Edw. III. and another of Lord Eldon (*Ex parte Ruffin*, 6 Ves. 126), and the principle was acted upon in *Rex v. Collector of Customs* (2 M. & S. 223). Thus, although, as observed by Mr. Baron Parke, it is remarkable that the law as to this nice question should be left in any degree of uncertainty, and that authorities should be found each way, the weight of them greatly preponderates against the survivorship at law of the property of merchants in joint chattels.

In the present case the question arose thus: the defendant had recovered judgment against the surviving partner of a manufacturing firm as executor *de son tort* to a deceased partner, and had taken in execution certain fixtures and machinery which the surviving partner had previously assigned to the plaintiffs as security for rent. The question was whether the legal property in the deceased partner's share passed to his executors or survived to his partners. The maxim was held to apply, and the term "merchants" was construed to include manufacturers; for the principle, it was said, being for the encouragement of trade, applies to manufacturers in partnership and every other description of traders.

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PRINCIPAL AND AGENT—UNDISCLOSED PRINCIPAL—AGENT  
REAL PRINCIPAL.

*Schmalz v. Avery*, 15 Jurist, 291.

THAT a contract made by an agent as principal may be sued upon either by himself or by the real principal, and, conversely, that the other party to such a contract may elect to enforce it either against the apparent or the real principal when discovered, may be safely laid down as a general rule. And where the agent contracts as such, but for an unnamed principal, the same rule may now be said to apply. This was clearly the case as far as the rights and remedies of the other party to the contract, and those of the undisclosed principal, are concerned, subject of course to the exceptions arising where the state of accounts has already been altered. But whether a contract entered into by an agent for an unnamed principal was capable of being enforced, not only against, but by him, as if he were the principal, was a point which had not yet been positively decided. It was raised in the present case upon these facts: the plaintiff sued in *assumpsit* for breach of a charter-party not under seal, entered into by him as "agent of the freighter," and which contained a clause (the insertion of which by mistake was proved by *parol evidence*)

providing that "This charter being concluded on behalf of another party, it is agreed that all responsibility on the part of S. & Co. ceases as soon as the cargo is shipped." It was objected that there was a variance between the declaration, which alleged the plaintiff to have contracted as a principal, and the written document proved, in which he was described as agent; and it was urged that by that description he ought to be concluded; and that had he been known to be the principal, the defendant might not have dealt with him. *Bickerton v. Burrell* (5 M. & S. 383), in which an agent, suing on a contract entered into by him as such, was not allowed to recover; and *Rayner v. Grote* (15 M. & W. 359), where he recovered only, because the contract was partly executed, were cited. These two cases, however, were both distinguishable, as the principal was named in each.

The question was, in the judgment, stated to be reduced to this, whether a refusal of the defendant to have contracted with the plaintiff as principal was to be assumed, and a broad rule laid down that a person contracting as for an unnamed principal, should be precluded from saying "I am that principal." Whether so to do was his original intention or not, the charter-party would be contradicted, but without prejudice to the defendant, who was regardless who the real freighter was. This contradiction would not, however, take place if the plaintiff could be considered as filling two characters, those of agent and principal; and although a man cannot strictly be said to be agent to himself, yet the court thought there was no absurdity in saying, that in a contract of that description, he might fill both characters—he might contract as agent for any freighter who might come forward, and still adopt that character afterwards himself. The clause limiting his responsibility as agent was clearly no objection, as he would continue responsible as principal.

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#### RAILWAY—RECOVERY OF DEPOSITS—EXECUTION OF SUBSCRIBERS' AGREEMENT.

*Ashpitel v. Sercombe*, 19 Law J. Exch. 82; *Watts v. Salter*, 20 Law J. C. P. 43.

ALTHOUGH the rights of allottees have become a question of happily much diminished interest, yet as these two cases are decisions of a court of error and of great weight on this branch of the law, a short notice of it in connexion with them will not be misplaced.

There seems to be no doubt that if a man pays money for shares in a scheme which either never comes into existence or

is abandoned before it is carried into execution, he may recover it as money had and received to his use, as having paid it on a consideration which has failed, unless he can be shown to have consented to or acquiesced in the application of the money which the directors have made.

The right of an allottee to recover his deposits upon shares in an abortive scheme, depends therefore upon the question if he has authorized their being, in such case, used in discharge of preliminary expenses. Thus, where the allottee has executed a deed which warranted such application, he is estopped from questioning its propriety, unless he can impeach the deed itself on the ground of fraud. So where he has not signed the deed, but the jury find that he has agreed to place himself in the same position as if he had; so also where he has assented to special terms introduced into the letter of allotment, he is likewise bound. But in *Ashpitel v. Sercombe*, where the plaintiff had written for shares to be taken subject to the provisions of the subscribers' agreement which he agreed to execute, and where this proposal was accepted, and thereupon the plaintiff paid the deposit, but never executed or even saw the subscribers' agreement, it became a question if the application of the deposits, which that deed warranted the directors in spending, was according to the terms of the contract under which they were paid. And the court were of opinion that it was not, and that the form of the application for shares made no difference. The letter, says Patteson J., in delivering judgment, does not refer to any specified agreement. . . . The plaintiff was not by it subjected to be bound by the terms of this particular deed, or of any other specified deed, but by the terms of any such deed as the directors might properly call on him to execute. If the directors prepared such a deed and gave him the opportunity to execute it, he would be bound by its terms, although he did not execute it; but if no deed at all or no deed which he could properly be called upon to subscribe was prepared, the condition becomes inoperative. And the court thought the deed in question clearly such a one as the plaintiff could not have been compelled to execute, as the powers it conferred exceeded those warranted by the 7 & 8 Vict. c. 110, s. 23.

In *Watts v. Salter*, the letter of application contained an undertaking to execute the necessary deeds, and between its reception and before the allotment, the capital and the number of shares were increased; the allotment was to be void on non-payment of the deposits by a certain day. A prospectus of the altered scheme was seen by the plaintiff, in which it was stated that all the shares were allotted, which was not quite exact. Afterwards the plaintiff saw the deeds and paid his deposit.

Deposits were paid on rather more than half the shares, and the allotment of the rest had become void for non-payment when the plaintiff executed the deeds. At the trial, these facts not being disputed, the judge directed a verdict for the plaintiff, on the ground that the plaintiff's execution of the deeds did not affect his right to recover, as its terms were not applicable to the concern he originally took shares in, and which at the time of his executing the deeds was already determined and abortive.

The defendant appealed, and the court of error unanimously thought the ruling was wrong. *Wontner v. Shairp* (4 C. B. 404) went entirely on the ground of fraud. Here fraud was not submitted to the jury. "We offer no opinion," said Parke, B., "as to whether the evidence would have sustained a finding to the effect that the plaintiff's execution of the deed was obtained by fraud. Nor is it necessary to consider how the case would have stood had the plaintiff not executed the deed. But we think that the deed must be read by itself;" and on this broad ground, that until the deed was affected with fraud, its plain words must be construed by themselves and without reference to the previous parol contract, judgment was reversed, as the deed fully warranted the application of the deposits.

The result would seem to be, that although, except in special contracts, an allottee cannot be called upon to execute a deed empowering the directors in case of failure to apply the deposits in discharge of liabilities, yet if he do execute it, or do anything tantamount, he will be bound by its terms. If, however, its execution was obtained by fraud, it is, according to *Wontner v. Shairp*, clearly otherwise; but fraud is not to be presumed from the mere fact of the deed's conferring larger powers than the original contract contemplated; it is a question of fact, and must be left to the jury, and until so found, the terms of the deed alone must govern the contract. On the other hand, a jury would not be warranted in finding a general undertaking to execute a deed, to be equivalent to the executing a particular deed not in conformity with the original contract.

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SEQUESTRATION—1 & 2 VICT. C. 106—PENAL PROCEEDINGS  
EX PARTE.

*Bonaker v. Evans*, 20 Law J. Q. B. 137.

THE principle that a man is not to be punished unheard, has been noticed in its bearing upon the construction of the 9 & 10 Vict. c. 95, ss. 98, 99, on two recent occasions, by notes in this Magazine; one in No. 12, N. S., upon *Ex parte Kinning*, the other in the last Number, upon the case of *Abley v. Dale*; and

the opinion expressed in these pages, that the decision of the Court of Exchequer, *In re the Hammersmith Rent Charge* (19 Law J. 357), would be found not to affect it, is supported by the judgment of the Court of Common Pleas in the cognate case of *Kinning v. Buchanan* having since been affirmed in the Exchequer Chamber by an all but unanimous decision (*Buchanan v. Kinning*, in C. S., Feb. 4, 1851).

The case at the head of this note contains a fresh sanction, and a striking illustration of it, also in a court of error. A vicar neglecting to reside at his vicarage, his bishop, after various other steps, caused a sequestration to issue under the 1 & 2 Vict. c. 106, s. 56, against his benefice, without any previous citation or summons; thereupon the present action was brought against the sequestrator for the profits, to try the validity of the sequestration.

The question was, whether it should have issued without the vicar's having an opportunity of disproving the charge of non-residence, or of showing that he had some legal excuse for it. It was admitted that the bishop was the final judge of the fact, so that there was no loss of the benefit of an appeal. Although the court thought that one of the objects of the sequestration was to enforce future residence, and that so far it was in the nature of a distress; yet, as under the 58th section of the statute 1 & 2 Vict. c. 106, it might become the first step towards deprivation, it was held, that another of its objects was clearly to punish past delinquency, and that consequently it was also in the nature of a penalty. It was considered that if the legislature had meant to authorize such a departure from the usual course of justice, as to proceed to punish *ex parte*, it would have done so in express terms, or at least by the strongest inference.

A portion of the judgment of Baron Bayley, in the case of *Capel v. Child* (2 Cr. & J. 568), in which he says, "I know of no case in which you are to have a judicial proceeding by which a man is to be deprived of any part of his property, without an opportunity of being heard in his defence," is cited, and the case itself, adduced as a strong instance of the firmness with which the court had adhered to the principle alluded to at the head of this note and elsewhere, characterized as being of justice both divine and human. Whatever question may be supposed to exist as to its right decision since "*In re the Hammersmith Rent Charge*," must therefore solely affect the construction of the particular statute, and not the principle adopted in it. Moreover, so fundamental did the Court esteem this principle, that they even hinted that a monition to reside, which had been issued by the bishop, without a previous notification of the charge in the

nature of a summons, was objectionable, because it was issued in a judicial capacity, and because it partook of a penal nature, in that the 55th section of the 1 & 2 Vict. c. 106, imposes *the costs of it*, at all events, upon the incumbent. Although the court disclaimed pronouncing any formalities necessary for a substantial hearing, they thought a notice that sequestration would issue in case of further absence not an equivalent. That the charge should be specified and an opportunity of rebutting it given, were held to be essentials, failing which, the sequestration was void.

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**COSTS—ISSUES OF LAW AND FACT—4 & 5 ANNE, c. 16, s. 5.**

Callander v. Howard, 20 Law J. C. P. 66.

Costs not being given by the common law, the right to them turns entirely on the construction of various statutes. As long as but one issue could be joined upon each count, its event depended upon the establishing the cause of action about which it was joined. But when, by the 4th Anne, c. 16, a defendant was enabled to plead several matters to the same cause of action, one or more issues might be decided for the plaintiff, while the alleged cause of action out of which they sprung might be negatived on another issue, and thus the success of each issue no longer varied with the merits of the controversy of which it was supposed to be the hinge. Therefore, as a collateral check to the cumulation of insufficient defences, the 5th section of that statute (which mentions demurrers also) gave the costs of the issues on pleas, on which the defendant failed, to the plaintiff, although his cause of action was defeated by another plea.

There are however many conflicting decisions on its application to circumstances like those of the present case, which are briefly as follows:—Issues of fact had been raised upon fifteen pleas, some to the whole declaration, others to one or more counts: the other plea, pleaded to the whole declaration, was specially demurred to and held good. All the other issues having been previously found for the plaintiff, he was held entitled to the costs of them; and had one or more of them been found against him, he would have been clearly entitled to the costs of the rest. In this *Bird v. Higginson* (5 Ad. & Ell. 83) was followed: in which two pleas to the first count resulted in an issue of fact found for the plaintiff, and an issue of law on which the defendant having succeeded (as well as on one issue on the other count), the plaintiff got the costs of the issue found for him. That decision, which overruled an earlier one (*Cooke v. Sayer*, 2 Burr. 753) in the same



court to follow one in the Common Pleas (*Yates v. Gun, Barnes*, 141), was itself in terms overruled by the Court of Exchequer in *Partridge v. Gardner* (4 Exch. 303), which decision was adhered to in *Howell v. Rodbard* (4 Exch. 309). The ground on which this was stated to be done was, that *Bird v. Higginson* was inconsistent with *Richmond v. Johnson* (7 East, 583), where two issues raised by two pleas to one count being found for the plaintiff with three shillings damages, he lost his costs under the 43rd Eliz., and it was held that this 5th sect. of the 16th Anne c. 4, did not apply. This is very clear, but by no means inconsistent with *Bird v. Higginson*, for in *Richmond v. Johnson* (and cases of that class) the plaintiff loses his costs by a collateral matter,—were it not for which, he would get them without the help of the 16th Anne; but in the present case, it is by reason of some one of several pleas, defeating his alleged cause of action, that he must resort to the 16th Anne for the costs of the issues on the pleas he succeeds upon. Now what difference can it make if the one plea which defeats him terminates in an issue of fact or law? Yet *Partridge v. Gardner* would make the costs of the issues on all the others depend upon this. As however *Clarke v. Allatt* (4 Com. B. 335), a modern case supporting *Bird v. Higginson*, had not been cited in it, it may be hoped that the doctrine laid down in it may be abandoned, as contrary to the weight of authority no less than to common sense.

It may be observed, that in *Partridge v. Gardner* had issue been joined on the pleas demurred to, and a verdict found on those also for the plaintiff, he would have lost his costs; for the declaration being bad, the defendant might successfully have moved in arrest of judgment.

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#### BILL OF EXCHANGE—FRAUD—ONUS OF PROVING CONSIDERATION.

*Smith v. Braine*, 15 Jur. Q. B. 287.

How to check bill swindling, without affecting the credit of negotiable instruments, is a difficulty which has occasioned some oscillation of the law; and as the present case settles a point of much practical importance, it becomes of considerable interest.

The general rule in all contracts not under seal, that if made without good consideration they are not capable of being enforced, meets with no exception in the case of bills; but the onus of proving the consideration is shifted. Its existence is presumed and the want of it must be re-established by the defendant; and if he relies solely upon the want of it as a defence, it must be alleged to be wanting at every transfer of the instru-

ment, where it is sued upon by a remote party; and the defendant must, if all those material allegations are put in issue, prove them all, notwithstanding the case of *Heath v. Sampson*, (2 B. & Ad. 291). Where however illegality and no value given by the plaintiff are set up as a defence to an action by an indorsee, and are both in issue, on proof of illegality the onus of showing consideration shifts back again to the plaintiff; but whether the same result would follow in the analogous defence of fraud was hardly settled.

An opinion expressed in the valuable treatise of Mr. Serjeant Byles (p. 94, 6th ed.), that on proof of the fraud the burthen of proving consideration will equally revert to plaintiff, is confirmed to some extent at least by this case. Here in an action by the second indorsee of a bill against the acceptor, the defendant pleaded that the drawer gave him the bill indorsed in blank; that he gave it to one M. to get discounted, for which purpose M. gave it to the first indorsee, who in violation of that purpose and against good faith and without authority or consideration indorsed to the plaintiff. These facts, being all put in issue, were all substantially proved except the want of consideration. The plaintiff gave some evidence in reply.

The defendant had a verdict on the plea, and a rule, pursuant to leave, to enter it for the plaintiff, was discharged. Two points were made,—that the facts did not warrant the inference of fraud, and that if they did still proof must have been given of the want of consideration. The court, while admitting that a mere want of consideration did not constitute fraud, held that the jury, though not bound so to do, might reasonably infer from the evidence that the prior indorsee meant from the first to misappropriate the bill, and that his declarations, which were relied upon as proofs of good faith, might in fact be considered only the false pretences by which he obtained and was allowed to keep the bill. As to the allegation that there was no consideration not being proved, the case of *Brown v. Philpot* (2 Moo. & Rob. 285) was certainly an express authority in the plaintiff's favour; but the court thought that case must be considered as overruled.

This case however only decides that the onus of proof shifts upon fraud being shown in the immediate indorser; and the position, that it is sufficient to show that the defendant was defrauded of the bill, must be qualified; for even if it were not necessary to show that the immediate indorser committed the fraud, it would at least seem necessary to show a state of facts, in which the fraud would afford a complete defence as against him, before the plaintiff could be called upon to prove that he is a holder for value.

## Short Notes of New Books.

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**Summary of the Law as applied to the rating of Railways and other Undertakings.** By Henry John Hodgson, Esq., Barrister at Law, Recorder of Ludlow. London: Stevens and Norton. 1851.

A VERY carefully compiled work, which will prove exceedingly useful to all who are connected with Railway Practice.

---

**Journal of Psychological Medicine and Mental Pathology.** Edited by Forbes Winslow, M.D. London: Churchill, Princes Street, Soho.

THIS work maintains its reputation for patient and earnest investigation of the maladies of the mind.

---

**The New Stamp Act, 13 & 14 Vict. c. 97, with Notes and Explanatory Observations and Tables of all the Stamp Duties, with a Digest of all the Cases not included in the Treatise on the Stamp Laws.** By Hugh Tilsley, Esq., Assistant Solicitor of Inland Revenue. Third edition. London: Stevens and Norton. 1851.

A WELL and carefully compiled edition of an indispensable book.

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\* \* \* Some notices prepared are unavoidably postponed till next number.

## Events of the Quarter.

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WE regret to announce the decease of Lord Langdale. He is succeeded by Sir John Romilly in the Rolls Court.

Sir Alexander Cockburn has been promoted to the office of Attorney-General, in place of Sir John Romilly, and is succeeded as Solicitor-General by Mr. Page Wood.

Lord Moncrieff is dead, and the Queen has been pleased to grant the vacant place of one of the Lords of Session in Scotland to Andrew Rutherford, Esq., Advocate for Scotland, in the room of Sir James Wellwood Moncrieff, Bart., deceased; and the office of Advocate for Scotland to James Moncrieff, Esq., her Majesty's Solicitor-General for Scotland, in the room of Andrew Rutherford, Esq., appointed a Lord of Session.

The Bill providing for the appointment of a third Vice-Chancellor, which has passed the House of Lords, has been printed by order of the House of Commons. It contains five clauses; and after reciting that the state of business in the Court of Chancery requires a successor to Sir James Wigram, empowers her Majesty to appoint a fit person, being a barrister of fifteen years' standing, to the office. The Vice-Chancellor to be appointed having the same power, privileges and rank as Sir James Wigram had, except that both the present Vice-Chancellors shall have precedence of him. The salary and retiring allowance of himself and his secretary, usher, &c., to be the same as those of Sir J. Wigram. The bill enacts that nothing therein contained shall authorise the appointment of a successor to the new Vice-Chancellor. The office has been conferred on Mr. Turner of the Chancery Bar.

Serjeant Ludlow died on the 14th March, and the Queen has been pleased to appoint Matthew Davenport Hill, of Lincoln's Inn, in the county of Middlesex, Esq., to be one of the Commissioners of the Court of Bankruptcy, to act in the prosecution of fiats in bankruptcy, in the country, in the room of Serjeant Ludlow.

Mr. G. K. Rickards, of the Oxford Circuit, has been appointed to succeed Mr. Booth, as counsel to the Speaker.

**CALLS TO THE BAR:—INNER TEMPLE, *January 31st.***—Eben Russell, Esq.; Henry James Holthouse, Esq.; John Hibberd Brewer, Esq.; William Christopher Daniel Deighton, Fellow of Queen's College, Cambridge, M.A.; William Trevor Parkins, of Merton College, Oxford, S.C.L.; Philip Anstie Smith, of Trinity

College, Cambridge; Granville Robert Henry Somerset, of All Souls College, Oxford, B.A.; John Sydney Smith, Esq.; John Mac Gregor, of Trinity College, Cambridge, M.A.; Robert William Harding, of Balliol College, Oxford, B.A.; Parry William Corbett Jones, of Worcester College, Oxford, B.A.; and William Marshiter, Esq.

MIDDLE TEMPLE, *January 30th.*—Tompson Chitty, Esq.; James Grant, Esq.; Walter Copland Perry, Esq.; William Hammet Beadon, Esq.; William Mackenzie, Esq.; Edmund Jackson, Esq.; Charles Watkins Merrifield, Esq.; Leonard Worsley, Esq.; William Francis Segar, Esq.; Walker Marshall, Esq.; James William Bowen, Esq.; William Crawford, Esq.; John Pugh Bridgwater, Esq.; and William Courthorpe, Esq.

LINCOLN'S INN, *January 30th.*—Danby P. Fry, Esq.; St. George Mivart, Esq.; Hilton T. Jenkins, Esq.; Thomas A. Corlett, jun. Esq.; Alexander H. Jenkins, M.A.; James T. Hopwood, Esq.; Robert W. Gilbert, M.A.; and William Freeman, Esq.

GRAY'S INN, *January 29th.*—Mr. Alexander Cheyne, B.A.

We shall defer any detailed notice of the new County Court Bill, now passing from the Lords to the Commons, until it has become law. We may, however, express our belief that, as at present modified, it will tend materially to assist the administration of justice in the country. Ten additional judges will be appointed, it is announced.

TESTIMONIAL TO THE LORD CHANCELLOR.—An address of the most flattering character has been addressed to Lord Truro by upwards 400 of the solicitors of the first firms in the kingdom, congratulating him on his well-merited elevation. Though much pressed for room, we cannot refrain from extracting the following passage from this eloquent address.

“Some of us can personally remember the earlier stages of this brilliant and remarkable career; many of us have been enabled by personal experience to appreciate the value to our clients of your lordship's zealous and indefatigable services as an advocate; and all have witnessed the powerful ability, the unwearied industry, and the energy, rarely equalled and never surpassed, which were devoted by your lordship to every cause intrusted to your lordship's advocacy—to the cause of the poorest and humblest equally with that of the most wealthy and powerful.

“Nor can we forget the unvarying courtesy and consideration in every stage of your progress which the members of our branch of the profession have experienced at your lordship's hands, while engaged in the discharge of our anxious and responsible duties.

“We cannot but feel that honours thus earned reflect a portion of their lustre on every member of our body, and we see in your lordship a conspicuous example of greatness achieved by persevering energy and unremitting diligence, directed by a vigorous understanding to the pursuit of a noble object, and at the same time a signal proof that under our happy constitution the exercise of such qualifications, united with an undeviating adherence to the principles of honour and integrity, may bring the highest dignities of the State within the reach of the humblest member of our profession.”

WE have to record the death of a noble member of the profession, a queen's counsel and benchers of Lincoln's Inn, who however, attained his eminent position from political services, and those of a peculiar nature, rather than from professional success. Most lawyers who arrive at the dignity of the House of Peers have pursued the long and painful path of pleadings, sessions, circuits and Westminster Hall, and with success. If they fail at the commencement, in their first trials, it may seem impossible that they should attain that which is the goal of successful ambition. Lord BEXLEY formed an exception. Born in 1766, a younger son of a respectable and rising, but not opulent family, Nicholas Vansittart left Christchurch for Lincoln's Inn to study for the profession of the Bar, not exactly as a means of subsistence, but as a liberal profession which was not ungenerous to her worthier followers. But he had mistaken his vocation, or he was unappreciated by attorneys; for it soon became evident that by continuing at the Bar he could never gain the ermine; and, indeed, a practice at the Bar could never have been congenial to his turn of mind, which appeared more fitted for the Church than any other profession; but he very soon allowed himself to enter the troubled waters of pamphleteering on political questions, and in politics he finally fixed his career. He entered Parliament in 1796 for Hastings, and commenced his official career by embarking on a mission to Copenhagen in 1801. In this mission, however, he was not very successful—perhaps success by simple negotiation was impossible; at any rate, Sir Hyde Parker and Lord Nelson were the immediate followers upon the scene on the retirement of Mr. Vansittart. However, he retained the confidence of his ministerial patron, and shortly after his return from Denmark was appointed joint Secretary to the Treasury, an office which he continued to hold till the breaking up of Lord Sidmouth's ministry in 1807, except a few months in 1805, when he was Chief Secretary for Ireland. In 1812 he was appointed Chancellor of the Exchequer, in which office he continued until the ministerial crisis in 1822-3, when he resigned—with rich inducements, however, or rewards, viz.: a peerage, a continuance in the Cabinet, and the Chancellorship of the Duchy of Lancaster. This latter office he held until 1828, when the Duke of Wellington being called to construct a cabinet, omitted Lord Bexley. Since that time his Lordship retired almost entirely from politics. But in the patronage and support which he afforded to philanthropic societies and to the educational movement, and particularly to King's College, London, his Lordship's efforts were perhaps of greater utility than in the arena where he had so long taken a prominent part.

Mr. Vansittart married in 1806 the Hon. Catherine Eden, second daughter of Lord Auckland. This lady died in 1810 without issue, and he never entered into a second marriage. The title, therefore, became extinct upon his decease.

Upon his elevation to the Chancellorship of the Exchequer in 1812, the Society of Lincoln's Inn elected Mr. Vansittart a Benchers of that Society—a distinction which of course was purely honorary.



The writings of Mr. Vansittart are few—chiefly pamphlets published during the commencement of his political career; and his principal parliamentary efforts were on the report of the Bullion Committee in 1810. Indeed it appears singular how few monuments have been left by a man who during six administrations, and for near a quarter of a century, occupied distinguished positions. It would have been thought that an able man could scarcely have avoided leaving prominent traits behind, or that a man wanting in ability could never have been advanced so high. His views in politics and politico-economical questions were not of the “advanced” order; and in his financial statements he seems to have possessed the art of mystifying himself and his hearers, and convincing both himself and others that his views were unanswerable, and therefore correct. In private life his admirable temper, his beautiful simplicity and suavity of manner, and the amiability of his disposition, ensured him the friendship and affection of all with whom he was brought in contact; and it was, perhaps, to these qualities, as much as to any qualities of the head, that he owed his success. He died on the 10th February, 1851, in the 85th year of his age.

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## List of New Publications.

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**Baker**—A Practical Compendium of the Recent Statutes, Cases and Decisions affecting the Office of Coroner; with Precedents of Inquisitions and Practical Forms. By W. Baker, Esq., one of the Coroners for Middlesex. 12mo. 14s. cloth.

**Bowyer**—Observations on the Arguments of Dr. Twiss respecting the New Roman Catholic Hierarchy. By G. Bowyer, Esq., D.C.L., Barrister. 8vo. 1s. sewed.

**Bowyer**—Readings in the Middle Temple, 1850. By G. Bowyer, Esq., D.C.L., Barrister. 8vo. 8s. cloth.

**Brady**—Plain Instructions to Executors and Administrators, shewing their Duties and Responsibilities. By J. H. Brady. Thirteenth Edition. 8vo. 8s. cloth.

**Byles**—A Treatise on the Law of Bills of Exchange, Promissory Notes, Bank Notes, Bankers' Cash Notes and Cheques. By J. Barnard Byles, Serjeant at Law. Sixth Edition. 8vo. 21s. cloth.

**Columbine**—The Hand Book of the County Courts, in which the various Proceedings to be adopted are explained. By D. E. Columbine, Solicitor. 12mo. 3s. sewed.

**Cox and Lloyd**—The Law and Practice of the County Courts in England and Wales. By E. W. Cox and Morgan Lloyd, Esqrs. Barristers. Third Edition. 12mo. 21s. cloth.

**Daniell**—A Supplement to Daniell's Chancery Practice, containing the Statutes, General Orders and Decisions to the Commencement of 1851, with Notes and an Index. By T. E. Headlam, Esq., Barrister. 8vo. 10s. boards.

**Dart**—A Compendium of the Law and Practice of Vendors and Purchasers of Real Estate. By J. H. Dart, Esq., Barrister. 8vo. 21s. boards.

**Domat**—Civil Law, by M. Domat. Translated by J. Cushing. 2 vols., royal 8vo. 2l. 10s. cloth. (Boston, U. S.)

**Foster**—A Treatise on the Writ of Scire Facias, with an Appendix of References to Forms. By T. C. Foster, Esq., Barrister. 8vo. 15s. boards.

**Hodgson**—A Summary of the Law as applied to the Rating of Railways, and other undertakings extending through several Parishes, with Notes of all the Cases decided. By H. J. Hodgson, Esq., Barrister. 12mo. 4s. 6d. boards.

**Lees**—A Practical Digest of the Mercantile Marine Act, 13 & 14 Vict. c. 93. By J. Lees. 12mo. 1s. sewed.

**Levi**—Commercial Law: its Principles and Administration; or the Mercantile Law of Great Britain compared. By L. Levi. Vol. 1. Part 2. 4to. 31s. 6d. cloth. (Edinburgh.)

**May**—A Practical Treatise on the Law, Privileges, Proceedings and Usage of Parliament. By T. E. May, Esq., Barrister. Second Edition, with the latest Alterations in the manner of passing Private Bills. 8vo. 21s. cloth.

*Phillimore*—An Inaugural Lecture on Jurisprudence, and a Lecture on Canon Law, delivered in the Hall of the Middle Temple, Hilary Term, 1851. By J. G. Phillimore, Esq., Barrister. 8vo. 3s. 6d. sewed.

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## Digest of Cases.

### COMMON LAW.

Comprising the Common Law Cases (not previously inserted) in the following Reports :—

11 Queen's Bench, part 5.	1 Queen's Bench Practice, part 4.
12 Queen's Bench, part 3.	6 Queen's Bench Practice, part 4.
7 Common Bench, parts 3 and 5.	19 Law Journal (N. S.), parts 11 and 12.
8 Common Bench, part 1.	20 Law Journal (N. S.), part 1.
4 Exchequer, parts 1, 3 and 4.	

**ACTION.**—*Staying, where a tender is pleaded.*—Where a plaintiff sued in a superior court for 9*l.* 10*s.*, and the defendant pleaded, except as to 8*l.* 14*s.* 6*d.*, never indebted, and to that sum a tender, and the jury found for the plaintiff on the first issue to the extent of 10*s.*, and for the defendant on the plea of tender, the court refused to stay the proceedings in an action brought for a sum under 40*s.*, but left the plaintiff to enter a suggestion under the County Court Act (9 & 10 Vict. c. 95, s. 129). *Nurdin v. Fairbanks*, 1 Q. B. P. 617.

**ADVERSE POSSESSION.**—Lands came to M., D. and E. as copartners by devise. M. married; and then M. and her husband and D. suffered a recovery of their portions to the uses respectively of M.'s husband for life, remainder to M. for life, remainder to the heirs and assigns of the survivor, and of D. in fee. Afterwards D. and E. married; and by agreement in 1759, recited to be "for drawing a deed of partition," the three husbands agreed to take the devised property and other premises which had come to the wives as co-heiresses at certain specified values, and to share the money arising from the estates by means of that division, share and share alike, and it was declared that that agreement should endure till the deed of partition should be executed. The husbands and wives entered upon the respective portions; and they and persons claiming under them were possessed thereof respectively till ejectment was brought as after mentioned. The husband of E. died in 1798, having devised the estates so held by him (not being part of the first devised lands) to E. and to his son, the rents to be equally divided between them

during E.'s life; after her death, to the son in fee. The widow and son entered and took the rents accordingly. The son died in 1802, leaving T. T. M., his eldest son and heir at law. The widow died in 1818. From that time till 1832, T. T. M. received the rents of the premises held by E. and her son as above stated. In 1832 he brought ejectment for E.'s undivided third part of the original estate. A case was stated for the opinion of the court, with liberty to them to draw inferences as a jury might, the questions being, whether the plaintiff was barred by the partition begun 1759, or by the Statute of Limitations. The above facts were set forth; there was no evidence of fine or recovery, or of any other proceeding, to carry the agreement of 1759 into effect, except that in 1830 the defendant, then holding the lands mentioned in the declaration, had written to T. T. M., the lessor of the plaintiff, requesting him to execute a deed, and go through some legal forms, to which T. T. M.'s wife also was required to be a party. The lands held by the defendant were those appropriated by the agreement to D.'s husband, who had died intestate, and D. surviving him, had devised them to a party who had entered in 1801, and under whom defendant came in: Held, that on the express statements in the case, no adverse possession appeared, and therefore none which, before stat. 3 & 4 Will. 4, c. 27, could have barred the ejectment. That, even if the court could have presumed the suffering of a recovery from length of possession, that presumption was excluded here by the express evidence of a written agreement; and the court could at most only presume something done which would give effect to that instrument. But that, as no more appeared to be contemplated by the agreement than a deed which would not have barred the estate tail, the plaintiff was entitled to judgment. *Doe d. Millett v. Millett*, 11 Q. B. 1036.

**AFFIDAVIT.**—1. *To hold to bail.*—Upon an application to the court to rescind a judge's order for holding the defendant to bail, under the 3rd sect. of the 1 & 2 Vict. c. 110, no other affidavits can, in general, be used than those which were before the judge when he made the order. Therefore fresh affidavits cannot be used, on an application of this kind, to show either that the plaintiff had no cause of action, or that the defendant was about to quit the country. But fresh affidavits may be used on an application under the 6th section to discharge the defendant out of custody, although a previous application has been made to a judge at chambers under that section. Where the affidavit on which the order to hold to bail is granted disclosed a cause of action for unliquidated damages only, it should specify the amount of damage sustained by the plaintiff. *Semble*, where, however, a judge had granted an order to hold to bail upon an affidavit which did not contain such a statement, the court refused to rescind the judge's order, or to discharge the defendant out of custody, as the judge might have been satisfied, upon the facts stated in the affidavit, that the plaintiff had sustained damage to the amount for which he ordered the defendant to be held to bail. An affidavit to hold to bail, in an action for criminal conversation with the plain-

tiff's wife, stated that she had been taken away from the plaintiff about two years ago, and the plaintiff had only recently discovered that she had been living ever since with the defendant in adultery, but omitted any positive averment that she was the plaintiff's wife when she was taken away, or that the defendant had committed adultery with her: Held sufficient. Where an order has been made to hold a defendant to bail, it is not necessary that the affidavit upon which it was made should show that a writ of summons has been first issued, as the court will intend that the fact was proved to the satisfaction of the judge. *Bullock v. Jenkins*, 1 Q. B. P. 645.

2. *Irregularity—Prompt application.*—A judge's order to allow the plaintiff to sue in formâ pauperis had been obtained on an affidavit which was defective for the want of an addition of the plaintiff's profession or occupation: Held, that the defect was a mere irregularity; and that, after several months had elapsed, in which the defendant might have examined the affidavit, and in which various steps had been taken in the cause, it was too late for the defendant to move to set aside the judge's order for the defect, and dispauper the plaintiff, although it was sworn that the defendant had only acquired knowledge of the defect three days before the motion. *Seymour v. Maddocks*, 19 Law J. (N. S.) Q. B. 525.

3. *Suggestion under the County Courts Act.*—Where the defendant's affidavits, on a motion for a suggestion under the County Courts Act to deprive the plaintiff of costs, stated that the residence of the plaintiff was within twenty miles of that of the defendant, and that the cause of action arose wholly within the jurisdiction of the County Court of B., which facts were denied by the affidavit of the plaintiff, the court refused to determine those questions on affidavits, and directed a suggestion to be entered. *Lewis v. Forsyth*, 20 Law J. (N. S.) Exch. 25.

And see JURAT. PRACTICE.

AGENCY BUSINESS. See ATTORNEY.

ALLOTTEE.—*Recovery of Deposit—Evidence.*—In an action by an allottee of shares in a projected joint-stock company to recover back the deposit, the plaintiff gave secondary evidence of the letter of allotment, the original having been lost, but did not produce the letter of application. The letter of allotment was headed, "Not transferable." The plaintiff also gave in evidence the banker's receipt stamped with a 20s. stamp. The deposit was paid in the year 1841; and in the year 1842 the plaintiff wrote a letter complaining that he had not received his shares in exchange; to which an answer was returned that every effort was being made to apply to parliament. Nothing further was done: Held, in the Exchequer Chamber, on the exceptions to the ruling of Pollock, C. B., there was sufficient evidence of the abandonment of the scheme, and that the plaintiff was entitled to recover as upon a failure of consideration; for if there was no letter of application, the letter of allotment and payment of the deposit constituted the contract; if there was a letter of application

the words "not transferable" imposed a new term; also, that the banker's receipt so stamped was admissible in evidence. *Chaplin v. Clarke*, 4 Exch. 403.

**AMENDMENT.** See PRACTICE.

**ANNUITY.**—*Setting aside of.*—To induce the court to set aside a warrant of attorney given to secure an annuity, on the ground of an improper returning or retaining of part of the consideration money, the fact of such returning or retaining must be distinctly and unequivocally sworn to. At the time of executing an annuity deed, the grantor, an attorney, received the full amount of the consideration money, 170*l.*, and immediately paid thereout 8*l.* 6*s.* 6*d.* for the costs of preparing the securities and inrolling the memorial, and 20*l.* to the grantee's agent, in satisfaction of a liability to him (the agent) upon a bill of exchange drawn by the grantor upon and accepted by his father, and which was within a week of maturity: Held, that this was not such a transaction as would warrant the court in setting aside the securities eleven years after the date of the grant. *Barber v. Thomas*, 7 C. B. 612.

**APPEAL.**—1. *Costs*—6 & 7 Vict. c. 18.—Where the respondent appears, but the appellant does not, the court will affirm the decision, with costs. *Borough of Newport, Isle of Wight, appellant, Pring, respondent*, 8 C. B. 13.

2. *Statement of grounds of.*—The 11 & 12 Vict. c. 31, s. 9, which enacts, "that no appeal shall be allowed against any order of removal, if notice of such appeal be not given as required by law within the space of, &c.," does not require that the statement of the grounds of appeal should be given within the prescribed time. *Reg. v. Derby, Recorder of*, 1 Q. B. P. 657.

And see MANDAMUS.

**APPRAISER'S LICENCE.** See PLEADING.

**ARBITRATION.**—1. *Direction to pay sum awarded—Excess.*—By a deed of reference between L. and a railway company, it was referred to an arbitrator to determine what sum of money was the value of certain land required by the company, and should be paid by the company for the purchase of it; and it was agreed that the purchase money should be paid to L. within three days from the date of the award, and that thereupon L. should execute a valid conveyance of the land, subject nevertheless to the payment of the amount into Chancery under the provisions of the Lands Clauses Consolidation Act. There was also a provision that the company should pay the costs of the conveyance and arbitration, according to the provisions of section 82 of the above-named statute. The award found the price, and directed the company to pay it to L. within the three days from the date of the award, and that thereupon L. should execute a conveyance. The award then directed the company to pay the costs of the conveyance pursuant to the above-named act, and also to pay the costs of the reference and award. On a rule nisi being obtained on the part of

L., calling upon the company to pay him the purchase money awarded, the company objected that the rule could not issue as the submission made it optional on the company to pay it to L. or into Chancery; that consequently the direction in the award to pay it to L. was an excess of authority, that the payment of the money was to be concurrent with the execution of the conveyance, and that thereupon L. was not entitled to demand the money without having executed the conveyance or shown a readiness to do so; that he was not entitled to the whole purchase money, but only to damages for breach of the contract; and that there had been no demand made for the costs awarded. The court notwithstanding these objections made the rule absolute. *Lindsay v. Direct London and Portsmouth Railway Company*, 19 Law J. (N. S.) Q. B. 417.

2. *Enlarging time—Submission—9 & 10 Will. 3, c. 15—Pleading.*—The 9 & 10 Will. 3, c. 15, is not confined to references of existing controversies. The 3 & 4 Will. 4, c. 42, s. 39, enables a judge to enlarge the time for making an award to a period beyond that to which the power of the arbitrator to enlarge is limited by the submission. To a declaration stating that the defendant covenanted that he or A. would pay the plaintiff 6800*l.* by certain instalments, with interest thereupon at 4*l.* per cent., with a proviso that in a certain event there should be deducted from the five last instalments sums not exceeding 4800*l.*, and that in that event the plaintiff should repay to the defendant and A. all interest which should have been paid in respect of the sum deducted, and that in default of payment of any of the instalments the whole should be recoverable; and averring that default had been made, and that no sum was deductible under the proviso; the defendant set out the deed on oyer, which contained a mutual covenant between the plaintiff, defendant and A., that if any disputes or differences should arise touching the sums which should be deductible under the proviso it should be and was thereby referred to an arbitrator, and that the said parties should abide by his award, so as it should be made on or before a certain day, with power to him to enlarge the time to a period not exceeding the 1st of July, 1847, and that the present submission should be made a rule of court; and the defendant then pleaded as to the five last instalments and interest thereon, that certain differences had arisen between the parties to the deed touching the sums deductible from the five last instalments; and that the plaintiff, defendant and A. did, in pursuance of the covenants in the indenture contained, submit to, refer, and did then refer the said differences to the said arbitrator, and the same were then referred to him to determine what sum (if any) not exceeding 4800*l.* should be deducted by the defendant and A., or either of them, from the said five last instalments; that the arbitrator duly enlarged the time for making his award until the 30th of June, 1847; that before that day a judge's order was made further enlarging the time until the 1st of December, 1847, and that before that day the arbitrator awarded that the whole of the 4800*l.*, being the total amount of the said five last instalments, should



be deducted from the said five last instalments; and that the defendant did therefore claim to deduct, and deducted, the said sum of 4800*l.* from the said five instalments, whereof the plaintiff had notice. On special demurrer the plea was held a good plea in bar as to the 4800*l.* and interest: Held, also, that the covenant in the deed became a good submission in writing within the 9 & 10 Will. 3, c. 15, as soon as the controversy arose, and that the judge had power to enlarge the time under 3 & 4 Will. 4, c. 42. *Parhes v. Smith*, 19 Law J. (N. S.) Q. B. 405.

3. *Power of arbitrator over verdict—Defendant's liability—Setting aside judgment entered pursuant to award.*—An action of assumpsit, in which the pleas were non-assumpsit, and payment by persons unknown, was referred by an order of nisi prius, which ordered, &c. “the defendant, by his counsel, admitting his liability to the plaintiff in respect of the several matters alleged in the declaration, that a verdict be entered for the plaintiff, damages 20,000*l.*, costs 40*s.*, but that such verdict shall be subject to the award of” the arbitrator named. At the first meeting the defendant's counsel objected to proceeding without amending the order, alleging it to be doubtful whether as worded it enabled the arbitrator to find, on the second issue, for his client. The plaintiff's counsel contended that it was sufficient for that purpose, and the arbitrator expressed the same opinion, and said that he had power to direct a verdict for the defendant on that issue; and the reference then proceeded. The award directed a verdict for the plaintiff on the first issue, and for the defendant on the second. No motion was made to set aside the award within the time limited by law. But after the *postea* had been drawn up pursuant to the award, and judgment had been signed by the defendant, the plaintiff applied to set aside the *postea*, judgment and subsequent proceedings, on the ground that the arbitrator had exceeded his authority in directing a verdict on the second issue for the defendant. The court refused the rule on the ground that to grant it would be indirectly to set aside the award which the plaintiff by his own laches had precluded himself from calling on the court to do directly, and also on the ground that as the plaintiff's counsel at the reference had concurred in the view that the arbitrator had power over the verdict, and thereby prevented the defendant from applying to have the order of reference amended, the plaintiff could not now be allowed to take the objection to the exercise of the power by the arbitrator. *Gravatt v. Attwood*, 19 Law J. (N. S.) Q. B. 474.

4. *Referring back matters to arbitrators.*—After an award made in favour of B. against W., on a submission to reference between them, which contained a clause empowering the court to remit the matters to the reconsideration of the arbitrators, W. moved to send back the award to the arbitrators on the ground that, since the award, he had discovered a letter in the handwriting of B., which contained material evidence in his favour. The arbitrators deposed that had such a letter in the handwriting of B. been produced at the reference

their decision would have been materially affected. B. in answer swore that the letter was not in his handwriting, but was an absolute forgery. The court remitted the case to the arbitrators for them to say if the letter were in B.'s handwriting, and, if they found that it was, then for them to reconsider the matters in difference. *Burnard v. Wainwright*, 19 Law J. (N. S.) Q. B. 423.

5. *Submission under Lands Clauses Consolidation Act*.—A., the owner of lands which were required for the purposes of a railway company, gave the company notice (under the 8 & 9 Vict. c. 18, s. 25) that it was his intention to nominate and appoint S. M. as his arbitrator, and that, if for fourteen days the company failed to appoint an arbitrator, he would appoint S. M. to act for both parties. The company failing, A. appointed S. M., who made an award in his favour. The appointment of S. M., which was made a rule of court, contained a recital of the above notice. The court refused either to enforce the award or to set aside the rule of court or award. *Semble*, that to entitle a party to appoint an arbitrator to act for both parties, under the 8 & 9 Vict. c. 18, s. 25, he should first appoint his own arbitrator and give notice of such appointment to the company before he requests them to appoint their arbitrator. *Bradley v. The London and North-Western Railway Company*, 1 Q. B. P. 597.

ARTICLES OF THE PEACE.—Articles of the peace are sufficient which state an apprehension of bodily harm if the exhibitant goes to a certain place to which he has a right to go, such as premises where he and the defendant carry on business in partnership; although it does not appear that if he refrains from going there he is in any fear of bodily harm. *Reg. v. Mallinson*, 1 Q. B. P. 619.

ATTACHMENT. See SHERIFF.

ATTORNEY.—1. *Change of name on roll*.—Upon an attorney's changing his name, the Court of Exchequer refused to direct the Master to alter the name on the roll of the court, but directed him to make a memorandum on the margin of the roll opposite to the applicant's name, stating that he is now known by the name of —, and that the same has been done by rule of court. *Ex parte Dear-den*, 1 Q. B. P. 666.

2. *Plea of no certificate*.—The 26th section of the 6 & 7 Vict. c. 73, only disables an uncertificated attorney from suing for fees, rewards, or disbursements for any business, matter or thing done by him as an attorney or solicitor in some suit or proceeding in one of the courts mentioned in the act. *Green v. Reece*, 8 C. B. 88.

3. *Privilege, plea of*.—To a plea of privilege by an attorney, as an attorney of the Queen's Bench, the plaintiff replied, averring that the defendant was an attorney of this court, and, after the prayer of judgment by inspection of the record, added an entry of continuance by curia advisari vult, and a day for judgment was given for the plaintiff: Held, that no rejoinder was necessary; and judgment was given for the plaintiff upon its appearing by the roll that the defendant

was an attorney of this court. *South Staffordshire Railway Company v. Smith*, 19 Law J. (N. S.) Exch. 356.

4. *Re-admission—Renewal of Certificate.*—It is not necessary for an attorney who has ceased to take out his certificate for a year, previous to the passing of the stat. 6 & 7 Vict. c. 72, to apply to be re-admitted as an attorney on his desiring to practise again. It is sufficient for him to obtain a rule to renew his certificate. *Ex parte Howard*, 20 Law J. (N. S.) Q. B. 27.

**ATTORNEY'S LIEN.**—1. A cause and all matters in difference had been referred to an arbitrator, the costs of the cause to abide the event. The arbitrator found for the defendant as to the cause, and as to the matters in difference awarded 303*l.* 15*s.* to the plaintiff, to be paid at the same time and place at which the plaintiff was to pay the costs of the action; and the defendant did, at the appointed time and place, pay the sum awarded to the plaintiff's attornies minus 180*l.*, the amount of the costs of the action, but refused to pay the residue unless the plaintiff paid the costs of the action. The plaintiff having become bankrupt after the making of the award, the court discharged a rule calling upon the defendant to pay the balance of the sum awarded to the plaintiff's attornies, who had a lien against the plaintiff for more than the amount awarded for costs incurred by them in the prosecution of the reference. The rule of Hil. T. 2 Will. 4, s. 93, only applies to cases in which the Court has a discretion to allow costs or damages of different actions to be set off against each other, and where there has been an application to allow such set-off. Where an arbitrator has awarded a sum to be paid to A. in respect of matters in difference between him and B., and the costs of the action (a smaller sum to be paid to B. at the same time and place), the court has no jurisdiction to order B. to pay the whole sum awarded to A. to A.'s attorney, on account of his lien for A.'s costs. *Dunn v. West*, 20 L. J. (N. S.) C. B. 1.

**AUDITA QUERELA.** See WRIT OF PRACTICE.

**AWARD.**—*Costs.*—Where a cause and all matters in difference are referred by an order of nisi prius, which orders that the costs of the cause shall abide the event, and the costs of the reference and award, to be taxed, shall be in the discretion of the arbitrator, judgment cannot be signed, nor the master's allocatur for the costs be obtained, until the end of the term next after the making of the award. *Jones v. Ives*, 1 Q. B. P. 689.

See ARBITRATION.

**BAIL.** See AFFIDAVIT.

**BANK.**—The plaintiff's broker by his direction was accustomed to pay his dividends into the defendants' bank, in London, to the plaintiff's credit, in account with K. & Co., bankers at Abingdon, where the plaintiff resided. On the 14th October, 1847, the broker so paid into the defendant's bank 127*l.* 5*s.* 9*d.* On the 15th, and before advice of the receipt thereof, K. & Co. stopped payment. The plaintiff having sued the defendants for the sum so paid into their

banks : Held, in the Exchequer Chamber, on exception to the ruling of the judge at the trial, that the payment into the defendants' bank was a payment to K. & Co., and that the defendants were entitled to a verdict. *Williams v. Deacon*, 4 Exch. 397.

**BANKRUPT.—1. Affidavit—Set-off.**—Where a creditor files an affidavit of debt under the Bankruptcy Consolidation Act (12 & 13 Vict. c. 106, s. 78), he is bound to notice and deduct any sum due to the debtor arising out of the same transaction as that out of which his own debt arises, and to claim for the difference only ; and if he omits to do so, he will be held not to have reasonable or probable cause for making the affidavit in the amount at which it was made. Where, therefore, in an action for goods sold and delivered, the plaintiff sought to recover the price of a cargo of coals, the freight of which he was bound to pay to the captain of the vessel before they could be discharged, and the defendant proved at the trial, as a set-off, payment of the freight, and reduced the verdict for the plaintiff by that amount : it was held that the plaintiff had not any reasonable or probable cause for making an affidavit of debt in the Bankruptcy Court for the full price of the coals, without deducting the amount paid by the defendant by freight, and the court, under 12 & 13 Vict. c. 106, s. 86, ordered that the defendant should have the costs of the suit. *Marshall v. Sharland*, 20 L. J. (N. S.) Q. B. 3.

**2. Affidavit—Costs.**—In an affidavit filed by a creditor, under stat. 5 & 6 Vict. c. 122, s. 11, to bring a debtor before the Court of Bankruptcy, *quære*, whether it be sufficient, in every case, to state the items of demand on the creditor's side, or whether, if there be cross claims, he is bound to state also the amount for which he gives credit. *Semble*, per Lord Denman, C. J., and Patteson, J., that he is. *Semble*, per Erle, J., *contra*. But if the creditor, in his affidavit, and in an account referred to by such affidavit and annexed to it, and served upon the debtor, states the total of his claim as 100*l.*, and the account specifies all the items of charge, which are summed up, and amount to 100*l.*, and credit is then given for a gross sum of 11*l.*, which, at the foot of the account, is subtracted from the 100*l.*, and the balance, by mistake, set down at 99*l.* : Held, that, if the creditor afterwards brings an action, and recovers less than 99*l.*, the debtor is not, therefore, entitled to his costs under stat. 5 & 6 Vict. c. 122, s. 19, for the affidavit must be taken as substantially alleging a claim of 89*l.* only. *Willading v. Temperley*, 11 Q. B. 987.

**3. Witness to prove the petitioning creditor's debt.**—Since the statute 6 & 7 Vict. c. 85, the bankrupt is an admissible witness to prove the petitioning creditor's debt. *Groom v. Watson*, 8 C. B. 217.

**BANKRUPT LAW CONSOLIDATION ACT.**—A messenger of the Court of Bankruptcy who, acting under a warrant to take the goods of A., takes the goods of B., is not protected by the 107th section of the Bankrupt Law Consolidation Act, although he acted *bonâ fide* and in the reasonable belief that he was acting in obedience to his warrant. *Munday v. Stubbs*, 1 Q. B. P. 675.

**BANKRUPTCY AMENDMENT ACT.**—5 & 6 Vict. c. 122, s. 4—*Order—Fiat.*—The Bankruptcy Law Amendment Act, 5 & 6 Vict. c. 122, s. 4, enacts, that fiats in bankruptcy shall be issued and transmitted by the Lord Chancellor's Secretary of Bankrupts, in such manner as the Lord Chancellor shall by any order direct, to the court to which such order shall be directed. The Chancellor by an order directed that every fiat directed to any District Court of Bankruptcy should be sent through the General Post Office to the deputy registrar of such court. A fiat in bankruptcy was signed by the Chancellor on the 7th of June at ten o'clock, was brought to the office of the Secretary of Bankrupts at five minutes past twelve, and at four o'clock on that day was posted by the secretary in a letter to the registrar of the District Court of Bankruptcy at Exeter, by whom it was received on the following day: Held, that the fiat was to be considered as "issued" when it was put into the post. *Hernaman v. Coryton*, 19 Law J. (N. S.) Exch. 353.

**BANKRUPTCY CONSOLIDATION ACT.**—*Deed of arrangement—Pleading.*—In a plea alleging that the defendant entered into a deed of arrangement with his creditors under the 224th and 225th sections of the Bankrupt Law Consolidation Act, 1849, (12 & 13 Vict. c. 106,) it is not necessary to set out the names of the six-sevenths of the creditors by whom the deed was executed, or the amount of their debts, or the trusts contained in the deed. The plea alleging two inconsistent days as the date of the execution of the deed, the court looked to other parts of the plea to ascertain which was to be adopted and which rejected. The execution of a deed of arrangement, under the 224th section of the act, by a trader unable to meet his engagements with his creditors, is a suspension of payment under the 225th section. A plea alleged that the defendant was and would be unable to pay his creditors in full, and that he executed a deed of arrangement, and then spoke of the said "suspension of payment," none having been distinctly averred: Held, that on general demurrer, it appeared sufficiently that there had been a suspension. *Quære*, whether the allegation would have been sufficient on special demurrer. A plea of this sort may be pleaded against the further maintenance. *Phillips v. Surridge*, 19 Law J. (N. S.) C. B. 337.

**BANKRUPTCY.**—*Fiat, when issued.*—A country fiat in bankruptcy was sealed by the Lord Chancellor at ten minutes before twelve, a. m., and remained in the custody of the Secretary of Bankrupts for the purpose of being transmitted until between four and five, p. m., when it was posted by a clerk in the office. A sale of the bankrupt's goods under an execution upon a judgment by warrant of attorney was completed at a quarter before four the same day: Held, that it was a protected transaction within the 2 & 3 Vict. c. 29, having been completed "before the date and issuing of the fiat." *Freeman v. Whitaker*, 19 Law J. (N. S.) Exch. 351.

**BASTARDY.**—*Order on married woman.*—Under stats. 7 & 8 Vict. c. 101 and 8 & 9 Vict. c. 10, an order may be made upon the

putative father for maintenance of a bastard child born of a married woman, though 7 & 8 Vict. c. 101, s. 2, speaks only of "any single woman." And the order is good though it describes the woman as "wife of G. R., single woman," or "wife of G. R." simply; and though it does not find the non-access of the husband, and though it appoints the payment to be made till the child shall attain the age of thirteen, or die, or the said G. R. shall again live and cohabit with his said wife the said M., or the said M. shall marry again, after the decease of her said husband. *Reg. v. Collingwood*, 12 Q. B. 681.

**BATTERSEA PARK ACT.** See PUBLIC OFFICES.

**BILL OF EXCHANGE.**—1. *Indorsement—Delivery for a special purpose.*—A. being the payee and holder of a bill of exchange, wrote his name upon it, and gave it to B. for the purpose of getting it discounted. B. never paid A. any money in respect of the bill, but kept it until it was overdue, when he delivered it to C. without receiving any value for it: Held, that there was no indorsement by A. to B. *Quære*, whether there was any indorsement by B. to C. *Lloyd v. Howard*, 20 Law J. (N. S.) Q. B. 1.

2. *Money paid.*—The plaintiff drew and indorsed a bill of exchange for the accommodation of the defendant, the acceptor, which was dishonoured when due; and he subsequently paid the holder a sum of money in discharge of his liability thereon, without having had notice of dishonour, and without any express request from the acceptor: Held, that he could not recover the amount from the acceptor as money paid to his use. *Sleigh v. Sleigh*, 19 Law J. (N. S.) Exch. 345.

And see PLEADING.

**BOROUGH COURT.**—*Order of reference of—Rule of superior court.*—An order of reference of a borough court of record expressed to be made by consent of the attornies of the parties, and containing a consent clause for making the order a rule of one of the superior courts at Westminster, may be made a rule of that superior court under the stat. 9 & 10 Will. 3, c. 15, as an agreement of reference between the parties. *Harlow v. Winstanley*, 19 Law J. (N. S.) Q. B. 430.

**BRIDGE.**—*County—Pleading.*—The word "riding" in the Statute of Bridges (22 Hen. 8, c. 5, s. 3), is not confined to districts called by that name, but includes any division of a county which corresponds in its definition to a riding. By 6 & 7 Will. 4, c. 87, the Isle of Ely has a separate commission and clerk of the peace, and a separate county rate and custos rotulorum from the county of Cambridge, and by 7 Will. 4 & 1 Vict. c. 53, s. 7, it is enacted, that in statutes theretofore passed or thereafter to be passed respecting counties, ridings or divisions, the Isle of Ely should be deemed and taken to be a division of a county: Held, that the Isle of Ely is included in the Statute of Bridges, and therefore its inhabitants are *primâ facie* liable at common law to repair the bridges situate within it, and may be indicted in the same form as ordinary counties. The general rule



as to bridges built prior to 43 Geo. 3, c. 59, is, that if a private person erects a bridge, and it becomes useful to the county in general, the county shall repair it. But where an act rendering a bridge necessary, though authorized to be done, is done primarily for private purposes and interferes with the public right, and the public user, for which public benefit is inferred, is referable only to that act, because made necessary by it, the authority to do the act in question is conditional only on the party maintaining the public right in the same state as before it was interfered with. Where, therefore, to an indictment for non-repair of a bridge by a division of a county, the plea showed that certain adventurers had, for the purpose of draining certain lands for their own benefit, and under the authority of commissioners of sewers, cut an artificial drain or river which intersected and obstructed an immemorial highway, and that they had erected the bridge in question over the said drain in the line of the former highway, and not upon the ancient course of any river, and that the former highway had been thenceforth carried over the bridge, that after the making the bridge the said drain and the bridge, and large quantities of land for the purpose of draining which the said drain was made, were vested by act of parliament in the corporation of the B. L., in trust for the said adventurers, with power to the corporation to levy money for maintaining the works; and that the said drain was very useful to the adventurers and to the corporation respectively, and had been always maintained for their benefit, and that since the passing of the said act the drain and bridge had always been vested in the corporation, and repaired by them for their own benefit and for that of the said lands vested in them, and for furthering the purposes of the said corporation; and that the corporation was liable and of right ought to repair the said bridge: Held, that, as the interruption of the highway by the adventurers was done for their own benefit, it could be legal only on the condition of substituting another highway by a bridge as convenient for the public as the old one, and that this condition was a continuing one, and that the plea afforded a good answer to the indictment: Held, also, that the plea was not double by reason of its alleging that the drain and bridge were vested in the corporation. *Reg. v. Inhabitants of Isle of Ely*, 19 Law J. (N. S.) Q. B. 433.

CASE.—1. The owner of a coal mine excavated as far as the boundary (which he was by custom entitled to do), and continued the excavation wrongfully into the neighbouring mine, leaving an aperture in the coal of that mine through which water passed into it and did damage: Held, that the party excavating was liable in trespass for breaking into the neighbouring mine, but not in an action on the case for omitting to close up the aperture on his neighbour's soil, though a continuing damage resulted from its being unclosed; and, therefore, that on an issue joined upon not guilty, the facts being proved as above stated, the defendant was entitled to the verdict. *Quære* whether, under such circumstances, a legal obligation attaches on the trespasser to use means on his own land for preventing a flow of water; but if it does, and an action is brought for not

using such means, the declaration must allege the duty specifically, and the plaintiff cannot recover on a count stating merely that the defendant wrongfully made the aperture and omitted for an unreasonable time to close it, whereby, &c. Nor can he recover at all for damage occasioned by the flow of water in consequence of the aperture remaining unclosed, if an action on the case has already been brought for making the aperture and letting in the water, which action was referred to arbitration, and the plaintiff, being made party to the reference in respect of any injury done to him by any of the matters alleged in the declaration in such action, has had damages awarded and paid to him for such injury, although the damage last complained of is subsequent to the award and payment. *Clegg v. Dearden*, 12 Q. B. 576.

2. *Habeas corpus ad satisfaciendum*—*Not guilty by statute*—*Discharge by Insolvent Court*—*Order and warrant*.—Case against the keeper of the Queen's Prison for not having the body of a debtor before the Exchequer, pursuant to a writ of habeas corpus ad satisfaciendum. Plea, not guilty by statute. The defendant had in his custody a debtor detained at the suit of the plaintiff on a ca. sa from the Palace Court. The debtor subsequently petitioned the Insolvent Court for his discharge under 1 & 2 Vict. c. 110, s. 35. On the 7th of January the vesting order was made. On the 27th of March the plaintiff sued out a habeas corpus ad satisfaciendum, returnable on the 15th of April, to charge the defendant in execution. On the 8th of April the Insolvent Court ordered the debtor to be discharged forthwith as to debts due on the 7th of January, excepting a debt due from the plaintiff, and as to that, that he should be discharged as soon as he should have been in custody at the suit of the plaintiff for three months, to be computed from the time of the vesting order. The warrant, dated the 9th of April, directed the discharge of the debtor in conformity with the terms of the vesting order, and on that day the prisoner was discharged. The defendant, on the 15th of April, returned to the writ of habeas that the debtor was discharged by a warrant of the Insolvent Court: Held, first, that the defendant was entitled to give the act and the special matter in evidence under the plea of not guilty by statute, pursuant to the 1 & 2 Vict. c. 110, s. 110. *Quære*, if the defence was open to the defendant under the plea of not guilty; secondly, that the defendant was bound to discharge the debtor, that he had no power to detain him until the return of the writ, or to take bail for his appearance thereto, or to retake him after his discharge; thirdly, that the warrant was not void, its meaning being that the debtor was to be discharged forthwith. *Harvey v. Hudson*, 20 L. J. (N. S.) Exch. 11.

3. *Injury to building by undermining*—*Averment of right to support*.—A declaration in case by reversioners stated that certain buildings and closes of land were in the occupation of A. and B. as tenants to the plaintiffs, the reversion belonging to them; that the defendant so negligently, and without leaving proper support, worked certain mines near and contiguous to the said premises, and dug mi-

nerals out of the mines near and contiguous to the said buildings and closes, whereby large portions of the buildings became injured, and the ground on which the buildings stood and the said closes swagged and gave way: Held, on motion in arrest of judgment, that the declaration was good; that as it did not appear that the soil in which the mines were belonged to the defendant, or that the defendant had all the right to get the mines that the owner of the adjoining soil had, the defendant was *prima facie* a wrongdoer, and that it was unnecessary to aver in the declaration that the plaintiffs had a right to have the buildings supported by the soil under which the defendant worked. *Jefferies v. Williams*, 20 Law J. (N. S.) Exch. 14.

CAUSE OF ACTION. See SEQUESTRATION.

CERTIORARI.—*Order of Court of Q. B.*—In order to remove into this court an order of quarter sessions for the purpose of enforcing it under the 12 & 13 Vict. c. 45, s. 18, it is not necessary that a writ of certiorari should issue, the simple order of this court being sufficient for that purpose. *Hawker v. Field*, 1 Q. B. P. 606.

CHARTER-PARTY. See PLEADING.

CHORISTER IN CATHEDRAL.—*Removal by dean and chapter—Appeal to special visitor—Sufficiency of return to mandamus.*—To a mandamus to restore J. H. to the freehold office of chorister, lay-clerk or singing-man of the cathedral church of Chester, conferring a right to vote for members of parliament, to which he had been duly appointed by the dean and chapter of such cathedral church, and from which he had been unjustly and without reasonable cause removed by the said dean and chapter. There was a return stating the foundation of the cathedral church, and some of the rules, ordinances and statutes for the governance of the same, providing, amongst other things, for the expulsion of any of the lay-clerks skilled in singing, at the discretion of the dean and chapter, and appointing the Bishop of Chester for the time being visitor of the cathedral church to watch and take special care that the statutes and ordinances were inviolably preserved, and to visit the church, and upon every one of the articles contained in the statutes, and upon every other article whatsoever that concerns the state, advantage and honour of the church, to interrogate the dean and all other ministers of the church concerning any misdemeanors or crimes whatsoever, and to punish and correct the same, and to execute every thing necessary to the extirpation of vice, and judged lawfully to belong to the office of visitor: Held, upon demurrer to the return, that the Bishop of Chester, as ordinary and special visitor, had exclusive jurisdiction to inquire into and determine the legality of the removal, and that an appeal to the bishop for that purpose was the only mode by which the party removed could properly proceed: held, also, that the omission to state in the return the particular offence on account of which the removal had taken place, was no good ground of objection to the return. *Reg. v. Dean and Chapter of Chester*, 19 Law J. (N. S.) Q. B. 485.

**CITY COAL ACT.**—*Delivery ticket — Vessel — Craft — Coal brig.*—The (local and personal) statute, 1 & 2 Vict. c. ci. s. 4, imposes a penalty for delivering any quantity of coals exceeding 560 pounds weight to a purchaser in London, or within twenty-five miles of the General Post-office, by means of any “lighter, vessel, barge or other craft,” unless a ticket containing certain particulars be delivered with them: Held, that the delivery of coals to a purchaser, direct out of the vendor’s coal brig on to the purchaser’s wharf within the district, without the intervention of any lighter, barge or other craft, was not a delivery from a “vessel” within the limited meaning of that word in this section, and therefore did not require to be accompanied by a ticket. *Blanford v. Morrison*, 19 Law J. (N. S.) Q. B. 533.

**CLERK OF COUNTY COURT.** See COUNTY COURTS.

**COAL MINE.** See CASE.

**COLONIAL LAW.**—*Notice of process—Foreign judgment not conclusive.*—A person residing in England, who is a member of a company carrying on business in a colony, must be taken to know the law of the colony. Where a colonial act enabled the chairman of a company to sue and be sued for the company, he is to be taken as agent for the members, and therefore a member resident in England, and sued on a judgment recovered in the colony in an action against the chairman, cannot avail himself of the fact that he had no notice of the process in that action, as a plea to an action brought in this country on the judgment. Where an act, providing for proceedings by and against a company, contained provisions for charging the property of members for the time being on a judgment obtained against the chairman, but in other respects reserved the rights and liabilities of parties as they were before: Held, that the remedy was cumulative, and that a member might be sued on the judgment recovered. A foreign judgment, though conclusive where it was given, is only *primâ facie* evidence of a debt here. Therefore, where the defendant, a member of a colonial company, in an action brought against him in this country on a contract entered into by the company, pleaded a judgment recovered in the colony against the chairman of the company as conclusive, the plea was held bad. *Bank of Australia v. Harding*, 19 Law J. (N. S.) C. B. 245.

**COMPANIES, JOINT-STOCK, WINDING-UP ACT.**—A creditor of a joint-stock company, who has sued an individual shareholder, and whose action has been stayed under sect. 73 of the Winding-up Act (11 & 12 Vict. c. 45), may continue his action so soon as he has proved his claim before the Master, although he had taken no further steps to enforce his claim under that act. *Prescott v. Hadom*, 1 Q. B. P. 640.

**COMPANY.**—1. *Calls, liability to be sued for—Transfer.*—An act of parliament incorporating a company, provided that, until a transfer of shares should be delivered to the secretary, the seller should remain liable for all future calls, and that no shareholder

should be entitled to transfer any share until he should have paid all calls for the time being due on it. It also enabled the company to make calls on the shareholders, and enacted that, if at the time appointed for payment of a call the holder of any share failed to pay it, the company might sue "such shareholder," and a form of declaration was given, stating that the defendant "is a holder of one or more shares." It also provided that on the trial it should be sufficient to prove that the defendant, at the time of making the call, was a holder of one or more shares, and enabled the company on nonpayment of any call to declare the shares forfeited: Held, that a person who was a shareholder at the time when a call was made and notice thereof given to him, but who had, before the call became payable, transferred his shares and delivered the transfer to the secretary, was liable to be sued for the calls. *North American Colonial Association of Ireland v. Bentley*, 19 Law J. (N. S.) Q. B. 427.

2. *Illegality of—Lottery.*—A company, consisting of a large number of persons subscribing small sums, was formed for the purpose of buying land, erecting dwellings thereon, and allotting the same to the subscribers. The allotment depended upon the result of a ballot. In connexion with this company there was established a bank for receiving the deposits of small capitalists and working men, upon the security of the property of the company, and, as part of the same concern, a bank in which the subscribers of the company might place their savings for purchasing their land from the company. The judge, in an action of libel, having directed the jury that the whole of this scheme was illegal on the grounds of its being contrary to the Lottery Acts, and also to the Bank Act: Held, that the scheme being illegal as being contrary to the Bank Act, there was no misdirection. *Quære*, whether it was contrary to the Lottery Acts. *O'Connor v. Bradshan*, 20 Law J. (N. S.) Exch. 26.

3. *Joint-Stock—Execution against a shareholder.*—Execution upon a judgment recovered against an incorporated joint-stock company within the provisions of the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16) can be obtained against a shareholder by sci. fa. only. The court will not grant a sci. fa. unless it be shown that sufficient property of the company cannot be found to satisfy the judgment. The return of nulla bona to writs of fi. fa. is not sufficient evidence that such property cannot be found. *Hichins v. Kilkenny, Great Southern and Western Railway Company*, 1 Q. B. P. 712.

4. *Judgment.*—The defendant held shares in the Union Bank of London, and judgment having been obtained in an action against him, a judge at chambers made an order under 1 & 2 Vict. c. 110, s. 14, charging such shares with the judgment debt. On application to set aside such order it appeared that the bank consisted of a great number of shareholders, and was carried on pursuant to the terms of a deed of settlement, by which it was provided that the shares should not be transferred except by the consent of the directors, and also that if any order or decree was made against any proprietor by which his shares became charged, they were to be forfeited to the company.

The company was not registered under 7 & 8 Vict. c. 110, but was entitled to sue and be sued by a public officer under 7 & 8 Vict. c. 113, s. 47, and 9 Geo. 4, c. 46: Held, per Parke, B., and Alderson, B., that it being doubtful whether the company was a public company or not, the order ought not to be set aside. *Quære*, whether the court has jurisdiction to set aside such order. *Graham v. Connell*, 19 Law J. (N. S.) Exch. 361.

5. *Lands Clauses Consolidation Act—Compensation—Notice of intention to summon jury.*—Section 38 of the Lands Clauses Consolidation Act (8 Vict. c. 18) applies only to cases where the promoters of an undertaking are about to take or injuriously affect land in the possession of the claimant, and in such case they are bound to give the claimant ten days' notice of their intention to cause a jury to be summoned to assess compensation, but such notice is not required where the promoters have already taken possession of or injuriously affected land, but for which no compensation has been made. Such a case is regulated by sect. 68, and if the claimant desires the question to be settled by a jury, and states the amount which he claims, the promoters are bound to pay the whole amount so claimed, or issue their warrant for summoning a jury within twenty one days. *Railstone v. York, Newcastle and Berwick Railway*, 19 Law J. (N. S.) Q. B. 464.

6. *Promissory note—Signature*—7 & 8 Vict. c. 110.—A document, signed by two directors of a joint-stock company, and directed to their cashier, in the following form: "Thirty days after date credit Mrs A. A. or order with the sum of 311*l.*, claims per Susan King, in cash on account of this corporation," was held to be a promissory note, to be binding on the company, though it might not have been issued so as to bind the shareholders under the deed of settlement, and to be sufficiently signed under the 7 & 8 Vict. c. 110. *Allen v. Sea, Fire, Life Assurance Company*, 19 Law J. (N. S.) C. B. 305.

And see EVIDENCE.

CONDITION PRECEDENT. See PLEADING.

CONSIDERATION. See MARRIAGE.

CONTRACT.—*Construction of—Evidence to explain.*—The plaintiff sold wool to the defendant "to be paid for by cash in one month, less 5*l.* per cent. discount:" Held, first, that the vendee was entitled to a delivery of the wool within the month without payment of the price; secondly, that evidence was inadmissible to show that, by the usage of the trade, vendors were not bound under similar contracts to deliver wool without payment, for that such evidence sought to annex to the contract an incident inconsistent with its terms. *Spartali v. Benecket*, 19 Law J. (N. S.) C. B. 293.

And see MASTER AND SERVANT.

CONVICTION.—*Appeal from—Recognizances.*—When a party is convicted at petty sessions and sentenced to imprisonment under the statute 6 Geo. 4, c. 129, which in section 12 gives a power of ap-



peal, and provides that the execution of every judgment appealed from shall be suspended if the person convicted shall "immediately" enter into certain recognizances with two sureties, it is not necessary that the recognizances should be taken at the time of conviction; but the prisoner is entitled to be discharged, if he makes his application to have the recognizances taken promptly and expeditiously after the conviction, regard being had to all the circumstances of the particular case. *Reg. v. Aston*, 19 Law J. (N. S.) Q. B. 525.

**COPYRIGHT OF DESIGNS.**—By 6 & 7 Vict. c. 65, a limited copyright is granted for "any new or original design for any article of manufacture having reference to some purpose of utility, so far as such design shall be for the shape or configuration of such article," provided such design is registered. A newly invented brick, the utility of which consisted in its being so shaped that when several bricks were laid together in building, a series of apertures was left in the wall by which the air was admitted to circulate, and a saving in the number of bricks required was effected, is a design capable of being registered under the above statute. *Semble*, that where the invention is the subject of a patent, it may still be registered under the Copyright of Designs Act. *Rogers v. Driver*, 20 Law J. (N. S.) Q. B. 31.

**COSTS.**—1. *Certificate to deprive plaintiff of, under 43 Eliz. c. 6.*—Where a judge has granted a certificate to deprive the plaintiff of costs under the 43 Eliz. c. 6, after judgment signed and execution issued, the certificate, although inoperative, is not void; and the court will give effect to it under particular circumstances, by setting aside the judgment and execution, upon payment of costs. *Lyons v. Hyman*, 1 Q. B. P. 601.

2. *Defendant in error—Judgment—Execution.*—If the plaintiff below recovers judgment by default, and the defendant below, after payment of the debt and costs, sues out a writ of error, on which the former judgment is affirmed in the Court of Exchequer Chamber, the plaintiff below is not entitled to his costs in error under the statute 3 Hen. 7, c. 10, as he has not been delayed in the execution of his judgment. *Sutherland v. Mills*, 20 Law J. (N. S.) Exch. 28.

And see **BANKRUPT**.

**COUNTY COURT.**—1. *Order of commitment to Whitecross Street Prison.*—A debtor not attending nor excusing himself on summons under the Small Debts Act, 8 & 9 Vict. c. 127, may, under sect. 1, be committed to the prison in Whitecross Street, London, (established by stat. 52 Geo. 3, c. ccix.,) though it appear on the face of the commitment that he is resident at the time in Middlesex. The order of commitment in default of attendance or excuse may be made in the party's absence. The order is sufficiently certain if it direct that the party be imprisoned for forty days, though it bears no date, and does not say from what time the imprisonment shall commence. The imprisonment reckons from the time when the debtor is arrested. The order need not be under seal. *Semble*, per Patteson and Erle,

Js., that if the prisoner pays the debt and costs during the term of imprisonment, stat. 8 & 9 Vict. c. 127, s. 3, obliges the commissioner or judge there mentioned to give leave for his discharge. *Bowdler's case*, 12 Q. B. 612.

2. *Order for payment—Judgment—Service.*—A defendant in a County Court having received a summons, and, failing to appear, was ordered verbally to pay the debt and costs forthwith, and between six and seven on the same day was served with an order of the County Court, whereby it was ordered “that the defendant do pay the same (the sum adjudged) to the clerk of the court at his office in Droitwich forthwith,” &c. “Attendance at the office from ten till four o'clock.” The defendant in the County Court not having paid the sum adjudged, his goods were subsequently taken in execution: Held, that the order to pay was a judgment similar to a judgment in the superior courts; that it did not require service, and therefore that the execution was regular. *Semble*, that an order for payment made by a County Court judge, and afterwards varied as to the time of payment, ought to be served upon the party liable to pay. *Ely v. Moule*, 20 Law J. (N. S.) Exch. 29.

3. *Removal of clerk from office—Quo warranto—Inability for office.*—A party removed from the office of clerk of a County Court by the judge of the court, with the approval of the Lord Chancellor, under the 9 & 10 Vict. c. 95, s. 24, for alleged inability, is entitled to try the validity of such removal by a proceeding in this court; and where, in a quo warranto information for that purpose, the jury found that the alleged inability upon which the party had been so removed consisted solely of great pecuniary embarrassment and want of money to pay his debts existing before and at the time of his removal: Held, that such embarrassment did not amount to “inability,” within the meaning of 9 & 10 Vict. c. 95, s. 24, and therefore that the party had been improperly removed. *Reg. v. Owen*, 19 Law J. (N. S.) Q. B. 490.

4. *Splitting demands—Abandonment.*—The defendant was indebted to the plaintiff for liquors supplied and money lent at different times. The plaintiff had been in the habit of marking down the separate items and afterwards entering them in his book as one account, and sent the defendant an account including the whole, amounting to 36*l.* 10*s.* 4*d.* The plaintiff levied a plaint in the County Court for 20*l.* for goods sold, the particulars of demand comprising no items for money lent. Having recovered judgment and obtained payment of this amount, he levied another plaint for 5*l.* 1*s.* 6*d.* for money lent, being the amount of the loans included in the account of 36*l.* 10*s.* 4*d.* At the hearing of the first plaint there was no abandonment: Held, that these were distinct demands, and that there was no ground for a prohibition. *Bremskill v. Powell*, 19 Law J. (N. S.) Exch. 362.

5. *Suggestion.*—Upon a motion for a suggestion under the 9 & 10 Vict. c. 95, s. 129, an affidavit by the defendant's attorney, stating the places of residence of the plaintiff and defendant upon information and belief only, is not sufficient. *Surridge v. Ellis*, 7 C. B. 1006.

6. *Trespass—Wrongful seizure.*—Where under 9 & 10 Vict. c. 95, s. 118, the judge of a County Court adjudicated in favour of a claimant whose house had been broken and entered, and his goods seized and taken away as the goods of an execution creditor in the County Court: Held, that the claimant was afterwards entitled to proceed in an action of trespass for the special damage occasioned by the wrongful breaking and entry, but not for the trespass in taking away his goods. *Chater v. Chignwell*, 19 Law J. (N. S.) Q. B. 520.

And see ATTORNEY.

COUNTY COURTS ACT.—1. *Attorney's charges.*—The clause of stat. 9 & 10 Vict. c. 95, s. 91, which limits the sum to be had or recovered by an attorney for appearing and acting in the County Court, applies to costs recoverable by the attorney from his client, as well as to costs taxed between party and party, and to every thing done by an attorney in regard to a suit in that court, whether before, at, or after the hearing. Costs above the limited amount are not recoverable against the client, though the attorney and he are parties to a prospective general agreement for allowance of such costs, on proceedings to be had in the County Court by the persons entering into such compact. *Re Clipperton*, 12 Q. B. 687.

2. *Same—Costs to attorney—91st section.*—The 91st section of the County Courts Act, 9 & 10 Vict. c. 95, does not apply to services rendered by an attorney in the conduct of a suit out of court and before its commencement. The above decision in *Ex parte Clipperton* is thus overruled. *In re John Toby*, 19 L. J. (N. S.) Q. B. 503.

3. *A demand reduced by set-off is not within the 129th section.*—A demand exceeding 20*l.*, and reduced by set-off to a sum not exceeding 20*l.*, is not within the jurisdiction of the County Courts. *Beswick v. Capper*, 7 C. B. 669.

COUNTY VOTE.—8 H. 6, c. 7, and 6 & 7 Vict. c. 18, s. 74—*Mortgagor.*—A., possessed of a freehold estate of the yearly value of 5*l.*, mortgaged it for 100*l.*; the deed was declared to be a security for the principal sum only, and the power of sale was for payment of that sum only at a day long past; but it was found as a fact that interest had been regularly paid upon the 100*l.* at 5 per cent.: Held, that A. had not an interest in land “to the value of 40*s.* by the year at the least above all charges” within the 8 H. 6, c. 7, and therefore was not entitled to be registered for the county. *Lee*, app., *Hutchinson*, resp., 8 C. B. 16.

COVENANT.—1. *Patent—Pleading—Assignment.*—In an action of covenant, the deed was set forth on oyer, reciting a former deed between plaintiff and defendant, whereby plaintiff licensed defendant to use a patent of which plaintiff appeared by the deed as recited to have obtained a regular grant. *Quære* whether defendant was estopped by the latter deed from denying that the patent was valid as recited in the earlier deed, or only from denying that a deed

alleging that fact was executed. By the earlier deed plaintiff licensed defendant to use his patent during a term, paying a stated royalty. By the deed declared in force, reciting the earlier deed and a subsequent contract of defendant with plaintiff for purchase of half the patent, subject to the former deed, but with benefit to defendant of half the royalty, plaintiff, in pursuance of the contract, and in consideration of 2200*l.* to be paid to him by defendant, assigned the patent to a trustee, subject to the previous indenture, and in trust to apply the sums accruing from licenses to use the patent, and likewise to apply the royalties for or under the direction of plaintiff and defendant respectively, in specified proportions, and to stand possessed as to one moiety of the letters-patent for plaintiff, as to the other for defendant. Plaintiff covenanted that for and notwithstanding anything done, &c., by him the patent was valid, and should be held and enforced by the trustee without lawful let, &c., by plaintiff, or any claiming under him, or by his act or default; and defendant covenanted with plaintiff to pay him the 2200*l.* by instalments. To a declaration in covenant for nonpayment of such instalments, defendant pleaded, after oyer of the deed declared upon, that plaintiff was not the first inventor, by reason whereof the patent, before the supposed breach of covenant, was void. Replication estopped: Held, on general demurrer, that the plea was bad, for, 1, no eviction was stated, and, in fact, the matter pleaded did not go to the whole consideration, since, even if the patent was void, the first executed deed would have bound the defendant by estoppel to payment of the royalty, and by the latter deed he became entitled to half the royalty; 2, that the covenant to pay the 2200*l.* was an independent covenant and capable of being enforced, whether the plaintiff's covenants were performed or not. *Cutler v. Bower*, 11 Q. B. 973.

2. *Payment of rates.*—Lessees covenanted that they would pay all taxes, charges, rates or rent-charges in lieu of tithes as then were or should at any time thereafter during the demise be taxed, charged, assessed or imposed upon the demised premises, except the land tax and property tax: Held, that the lessees were bound to pay all rates then imposed on the lessees in respect of their occupation, e. g. church rate, highway rate and poor rates, and all other rates which might be imposed on the land itself. *Hurst v. Hurst*, 19 L. J. (N. S.) Exch. 410.

3. *Trees.*—A declaration stated that the defendants had covenanted not to cut down or lop any tree under a penalty of 20*l.* for each tree so cut down or lopped, over and above the value of such tree, and averred as a breach that the defendants lopped divers, to wit, twenty trees of the value of 80*l.*; and then and thereby the defendants became liable to pay a large sum, to wit, 80*l.*, being the value of the said trees, to the plaintiff, and also the further sum of 20*l.* for each of the trees so lopped. It was proved that one tree only had been lopped: Held, that the judge ought to have directed the jury that

the 20*l.* penalty could not be recovered. *Hurst v. Hurst*, 19 L. J. (N. S.) Exch. 410.

4. *Pleading—Condition precedent.*—A lease contained a proviso that on notice to quit being given by the lessor eighteen months before the end of the eighth year, and all arrears of rent being paid, and all covenants and agreements on the part of the lessee having been observed and performed, the lease should determine at the end of the eighth year, nevertheless without prejudice to any claim or remedy which any of the parties hereto may then be entitled to for breach of any of the covenants or agreements hereinbefore contained: Held, that the performance of all the covenants by the lessee was not a condition precedent to his right to determine the lease. *Friar v. Gray*, 19 L. J. (N. S.) Exch. 368.

5. *To build—Construction of.*—A declaration in covenant stated that the defendant covenanted that she would within eighteen months from the date of the indenture erect certain buildings, "the whole of which were to be left to the superintendence of the plaintiff and E. J., the defendant's son." The breach alleged was, that though the eighteen months had expired, the defendant had not erected the buildings: Held, that the declaration was good, although it contained no averment that the plaintiff was ready and willing to superintend the erection of the buildings, for that the covenant to erect the buildings was an absolute covenant, and the clause respecting the superintendence merely granted a liberty to the parties to superintend, but did not impose any duty so as to make the superintendence a condition precedent or concurrent. *Jones v. Connock*, 19 L. J. (N. S.) Exch. 371.

6. *To deduce good title—Damages.*—A declaration in covenant after reciting two agreements between the plaintiff and the defendant, stated that by a third agreement of the 27th of September, 1848, between the same parties, the defendant agreed to demise to the plaintiff on or before the 29th of November, a certain ferry, &c., at a certain rent, and agreed within fourteen days from the date thereof to deduce a good title thereto, and that the plaintiff agreed to pay to the defendant before the 29th of November, 3150*l.*, upon having a good title deduced. Breach, that the defendant did not within fourteen days, &c., or at any other time, deduce a good title. Second plea, that the plaintiff was not ready and willing to perform all things to be performed, &c. Third plea, that the defendant did deduce a good title to the premises according to the agreement. The plaintiff, a solicitor and promoter of a company provisionally registered for making improvements in Hayling Island, by agreement of the 17th September, 1850, agreed with the defendant, who was the owner of land there, for the demise to the plaintiff of a ferry, land, houses and premises, and that the defendant should within fourteen days from the date thereof furnish an abstract of his title to the premises and deduce a good title thereto, and that the plaintiff agreed to pay to the defendant on or before the 29th of November, 3150*l.* After this agreement a company was formed, and provisionally registered by the plaintiff as

its promoter, its object being to make a ferry, to erect gasworks and bathing-houses, &c., on Hayling Island. On the 10th of November the defendant sent to the plaintiff an abstract of his title, which disclosed a mortgage of the premises to the trustees of the defendant's marriage settlement, one of whom was imbecile. There were also two judgments against the defendant. In consequence of these objections to the title the association was dissolved by its members, and the 3150*l.* was not paid to the defendant: Held, that the plaintiff was entitled to succeed on the above issues, and that he was entitled to recover as damages the costs of preparing and entering into the agreement, of investigating the title, of endeavouring to procure a good title, and also of the grant of the lease, but that he was not entitled to recover as damages the expenses of raising the 3150*l.* and loss as interest, nor the expense of preparing the deed of settlement of the company, nor the money expended in forming the company and in registering it provisionally, nor the loss of profits from the granting of the lease and the establishment of the association, nor the profits he would have derived as an attorney in carrying out the objects of the association, nor the other advantages he would have derived from his time, trouble, &c., bestowed in the formation of the company. *Hanslip v. Padwick*, 19 Law J. (N. S.) Exch. 372.

And see GOODWILL.

**DEED.**—1. *Construction—Schedule and map.*—A deed conveyed the messuage and land called G. farm, consisting of particulars specified in a schedule, and delineated in a map drawn on the schedule: Held, that a close not included in the map and schedule did not pass by the conveyance, although it had been occupied with the specified closes and treated as part of G. farm. *Barton v. Daves*, 19 Law J. (N. S.) C. B. 302.

2. *Construction of—Operative words—Recitals.*—Where the words in the operative part of a deed of conveyance are clear and unambiguous they cannot be controlled by the recitals or other parts of the deed. But where those words are of doubtful meaning, the recitals or other parts of the deed may be used as a test to discover the intention of the parties and to fix the meaning of those words. A deed of settlement, after reciting that A. had power to appoint the lands thereafter appointed, &c., or expressed and intended so to be, with other hereditaments, and then reciting an indenture of mortgage of certain of the lands to secure 20,000*l.* at 4*l.* per cent. interest, and that upon the treaty for an intended marriage it was agreed that such of the hereditaments subject to the appointment of A., as were comprised in the said recited indenture of mortgage (together with the lady's property) should be settled to certain uses, proceeded: "Now for carrying into execution the said agreement as far as respects the said hereditaments subject to the appointment of A. as are hereinafter appointed, &c., or expressed and intended so to be," it is witnessed, that in consideration of the said intended marriage, A. directed, limited and appointed that the messuages, &c., hereinafter released,



&c., should be and remain (but subject and charged as hereinbefore is mentioned) to certain uses, including an annuity of 250*l.*, with powers of distress and entry; and it further witnessed, that the said A. granted, released, &c., all and singular the messuages, &c., of him the said A., situate in the several parishes of C., D. and E., and which are intended to be specified and described in the schedule hereunder written, but which schedule is not intended to abridge or affect the generality of the description hereinbefore expressed and contained. The schedule comprised only the mortgaged hereditaments, the rental of which was 1390*l.* A. had other lands in the parishes of C., D. and E. besides those included in the mortgage: Held, that, taking the whole of the deed of settlement together, a clear intention was shown that only the hereditaments included in the mortgage should pass by it; held also that the powers of distress and entry being given in respect of an equity of redemption did not control the intention to be collected from the whole deed. *Walsh v. Trevanion*, 19 Law J. (N. S.) Q. B. 458.

3. *Registration of—Memorial, form of—Description of parcels.*—The 7 Anne, c. 20, s. 6, requires that “every memorial of a deed to be registered in the county of Middlesex shall express or mention the honors, &c., hereditaments and premises contained in such deed, and the names of all the parishes, &c., within the county where any such honors, &c., are lying or being, that are given, granted or conveyed by any such deed, in such manner as the same are expressed and mentioned in such deed, or to the same effect,” and the deed to be registered is required to be shown to the registrar at the time of requiring the memorial to be registered. An application was made to register a deed of assignment which was indorsed on an indenture of lease. The assignment described the premises as “messuage, &c., comprised in and demised by the within written lease.” The lease described the premises as “all messuage in King Street, in the parish of Hammersmith.” The registrars refused to receive and register a memorial stating the deed to be a deed of assignment assigning a messuage situate in King Street, in the parish of Hammersmith, by the description of the messuage, &c., comprised in and demised by the within written indenture: Held, that the registrars had acted rightly, as the memorial was not in compliance with the statute. Where a deed indorsed on a former deed and importing by reference the description of the premises is to be registered, the memorial should give the dates and parties from both deeds, together with the description of premises from both deeds, and should state that the imported description is taken from the source referred to. *Reg. v. The Registrars of Deeds for the County of Middlesex*, 19 Law J. (N. S.) Q. B. 537.

And see EVIDENCE.

DEVISE.—*Trustee—Estate in fee and for life.*—A devise was in these terms: “I give to B. and S., their heirs, executors, &c., my freehold and leasehold estates at Reading, and I give full power and authority to B. and S., and their heirs, to accept surrenders of all

present and future leases, and grant new leases. I give to B. and S. all my other real estate in trust, out of the rents and profits thereof to pay to my wife the jointure of 700*l.* settled by me on her; and also to pay out of the rents and profits of my freehold estates unto F. B. during her life an annuity of 100*l.*, and thereout also to pay E. during the joint lives of her and F. B. an annuity of 300*l.*; and after the decease of F. B., if C. should survive her, to pay C. an annuity of 400*l.*; and after the decease of C., in case she shall have only one child, then in trust to pay out of the rents and profits of my said estates the yearly sum of 200*l.* for the maintenance of such child until he or she shall attain the age of twenty-five years, and after that in trust to raise the sum of 1000*l.* to pay to him or her at that age. And my will is that so much as my residuary personal estate shall fall short of paying my debts and legacies hereby given, shall be by my trustees raised and paid out of the rents and profits of my several estates, and by mortgage of all or any part thereof; and after payment of the interest of the money so to be borrowed, and the expenses of keeping my estates in repair, and all such costs as my trustees shall expend by means of the trusts, in trust to pay out of the overplus rents and profits thereof 60*l.* yearly for the maintenance of the eldest son of B. until he shall have attained the age of twenty-three years; and I hereby give full power to my said trustees, and I do order and direct, that they shall settle a jointure on any woman such eldest son shall marry of 60*l.* per annum; and in trust to apply the overplus rents and profits of my estates in paying off the money so to be borrowed on mortgage, and after payment thereof to pay the rents and profits of my said estates to B. during his life to his own use; and after his decease then my trustees shall stand seised of my real estates to, for, and upon the following uses (that is to say) to the use of J. B., the eldest son of B., during his life, and after the determination of that estate to the use of M. and his heirs during the life of J. B. upon trust to preserve contingent remainders; and after his decease to the use of the son of J. B. and the heirs male of his body; and in default of such issue to the use of the second, third, fourth and all other sons of J. B. successively in remainder, and the several heirs male of the bodies of such sons." There were other limitations over of the same kind in default of issue, and a gift to trustees to support contingent remainders followed each life estate: Held, that the trustees took an estate in fee simple in the property devised. *Blagrove v. Blagrove*, 19 Law J. (N. S.) Exch. 414.

**EASEMENT.**—*Mining*—*Right of owner of surface to support of subjacent strata*—*Pleading*.—When the surface of land belongs to one man, and the minerals belong to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, the owner of the minerals cannot remove them without leaving support sufficient to maintain the surface in its natural state. The owner of the surface close, while unencumbered by buildings and in its natural state, is entitled to have it supported by the subjacent mineral strata, and if the surface subsides and is injured by the removal of these strata,

although the operation of removal may not have been conducted negligently nor contrary to the custom of the country, the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence. A declaration alleging that the defendant wrongfully and improperly, and without leaving any proper or sufficient pillars or supports in that behalf, worked certain coal mines under and contiguous to the close of the plaintiff, and dug for and got and moved the coals, minerals, earth and soil of and in the said mines, and that by reason thereof the soil and surface of the said close sank in, cracked, swagged and gave way, is sufficient without an express allegation that the plaintiff was entitled to have his close supported by the subjacent strata. *Humphries v. Brogden*, 20 Law J. (N. S.) Q. B. 10.

And see TRESPASS.

**ECCLESIASTICAL LAW.**—*Matter touching the crown—Jurisdiction of the Privy Council—Convocation—Duplex querela.*—In a suit of duplex querela before an archbishop, whether the subject-matter thereof touches the crown or not, an appeal is given by the 25 Hen. 8, c. 19, to the High Court of Delegates, and since 2 & 3 Will. 4, c. 92, to the Queen in council, there to be finally determined. If this were not the case, the Court of Exchequer has jurisdiction to grant a prohibition. *Semble*, that the 25 Hen. 8, c. 19, has repealed the 9th sect. of the 24 Hen. 8, c. 12, which enacts, that in matters “touching the king” the appeal from certain ecclesiastical courts shall be to the upper house of convocation. The crown as patron having presented a clerk to a living, the bishop refused him admission, on the ground of his opinions being unsound and not in accordance with the doctrines of the Church of England; the clerk thereupon brought a suit of duplex querela in the archbishop’s court, complaining of the bishop’s decision and stating that his doctrines were not inconsistent with those of the Church of England. *Quære*, whether this proceeding was a matter “touching the king” within the stat. 24 Hen. 8, c. 12. *Gorham v. Bishop of Exeter*, 19 Law J. (N. S.) Exch. 376.

**EJECTMENT.**—*Adverse possession.*—The defendant being in adverse possession of a hut and piece of land, the lord of the manor entered in the absence of the defendant, but in the presence of his family said he took possession in his own right, and he caused a stone to be taken from the hut, and a portion of the fence to be removed: Held, that these acts were not sufficient to disturb the defendant’s possession, under the 3 & 4 Will. 4, c. 27, s. 10. *Doe d. Baker v. Combes*, 19 Law J. (N. S.) C. B. 306.

**ENDORSEMENT.** See BILL OF EXCHANGE.

**EVIDENCE.**—1. *Adverse witness—Questions to contradict a party’s own witness—Relevant statements—Next friend a competent witness.*—A witness, who upon trial of a cause gives evidence adverse to the party calling him, may be asked whether he had not given a

different account of the same matter before the trial. But, per Patteson, J., and Coleridge, J., in the event of a denial by the witness another witness cannot be called to contradict him in that respect. The party calling a witness may afterwards examine other witnesses as to the truth of statements made by such witness, tending to throw discredit upon them for the purpose of setting up their credit. The plaintiff in an action for an assault, being under age, sued by her father as her next friend. A witness on behalf of the plaintiff gave evidence which went to disprove the cause of action, and stated that the plaintiff's father had tampered with her before the trial as to the evidence she was to give; and on her cross-examination, that the plaintiff had told her that her brother and she went to romp in the cellar, and she fell over a barrel and so hurt herself: Held, that the father of the plaintiff might be called to contradict the statement as to his having tampered with the witness, and the plaintiff's brother to contradict his ever having romped with the plaintiff, such statements being relevant to the matter in issue. The plaintiff's next friend on the record is a competent witness, and not within the exception in sect. 1 of the 6 & 7 Vict. c. 85. *Melhuish v. Collier*, 19 Law J. (N. S.) Q. B. 493.

2. *Companies Clauses Consolidation Act*, 8 & 9 Vict. c. 16—*Register of shareholders*.—The register of shareholders of a company within the Companies Clauses Consolidation Act, authenticated by its seal, is admissible in evidence without any proof that such seal was affixed at an ordinary meeting of the company pursuant to the 9th section. *North-Western Railway Company v. M'Michael*, 20 Law J. (N. S.) Exch. 6.

3. *Privileged communication—Waiver*.—At the trial of an ejectment to recover land claimed as parcel of the glebe of a rectory, a book describing the lands subject to tithes and a map stating the glebe lands were produced by an attorney, who stated that he had received them from a former rector, who was also owner of the advowson; the book being given to him for the purpose of collecting the tithes, and the map with a view to the sale of the advowson, which was afterwards effected, and the lessor of the plaintiff appointed to the rectory by the purchaser: Held, that the map was not a privileged communication; and, *semble*, that the book was not; the heir and executors of the deceased rector having authorized the production of these documents: Held, by Erle, J., that they were competent parties to waive the privilege, if any existed. *Doe d. Marriott, clerk, v. The Marquis of Hertford*, 19 Law J. (N. S.) Q. B. 526.

4. *Provisional committee-man of railway company*.—In an action by A. and B. for work done for a railway company as engineers against C., it appeared that C. was a member of the provisional committee, and took part at a meeting on the 9th of September, 1845, at which the plaintiff A. and one D. were appointed joint engineers, and S. was appointed secretary to the company. D. never acted as such engineer, but there was no proof that his appointment had ever been revoked; all the work had been done by the plaintiffs. At a meet-

ing of the board (the date of which did not appear), the defendant C. proposed that the engineers should be paid through the solicitors out of the money which was come from the shareholders, but the names of the engineers were not then mentioned. On a subsequent occasion one of the plaintiffs, A., was paid a sum of money by one of the solicitors of the company. In order to prove that the plaintiff B. had been appointed one of the joint engineers to the company, a letter from the secretary signed by him, and headed "Minute of the Board, Sept. 13, 1845," which letter stated that it was resolved "that B. be requested to accept the office of joint engineer to the line," was offered in evidence, and also an entry in the minute book, also written by the secretary (it being his business to enter in the book all minutes of the proceedings of the board). This entry was, "Minute of the Board, Sept. 13, 1845: Resolved, that B. be requested to accept the office of joint engineer to this line." This entry did not contain the names of any persons present at the meeting, nor had it the signature of any person as chairman, although that word stood at the bottom of the entry, preceded by a blank for the name, and there was no independent evidence to show that any meeting of the board was held on the 13th of September, or that the secretary had any authority to write the letter in question: Held, in error, on a bill of exceptions, that these documents were not admissible in evidence, and that independently of them, there was no evidence to go to the jury of the defendant's liability. *Remington v. Wynn*, 4 Exch. 691.

And see ALLOTTEE. CASE. PERJURY.

FEE-FARM RENTS. See LIMITATIONS.

FEIGNED ISSUE. See INCLOSURE ACT.

FIXTURES. See PLEADING.

FRAUDS, STATUTE OF.—*Part acceptance—Waiver.*—A. bought a certain quantity of wheat, in value about 10*l.*, which wheat was to be reduced to a certain standard by dressing. After the making of the contract, A. sent for a small portion of the wheat, which was then sent to him, but not dressed, whereby it fell short of the standard agreed upon, but he retained it without objecting to it; Held, that this was a part acceptance within the Statute of Frauds, and that retaining a portion so sent amounted to a waiver of the full performance of the contract by the plaintiff as to that portion. *Gilliat v. Roberts*, 19 Law J. (N. S.) Exch. 410.

FREIGHT, CONTRACT OF. See PLEADING.

GOOD-WILL.—*Sale of—Covenant.*—The saleable quality of good-will in trade deserves protection. A covenant by which a butcher on assigning certain premises for the residue of a term, and also his good-will in trade to another butcher, covenanted not to carry on the trade of a butcher within five miles of the premises assigned, is good in law, and it continues binding on the covenantor after the expiration of the term and during the life of the covenantee, although

he may have ceased to carry on the trade. *Elves v. Croft*, 19 Law J. (N. S.) C. B. 385.

GREAT WESTERN RAILWAY. See TOLLS.

**GUARANTEE.**—*Consideration—Parol evidence to explain.*—A declaration in assumpsit, after alleging that A. L. had requested the plaintiff to sell him goods upon credit, and that the plaintiff had agreed to do so, provided the defendant would guarantee the price of the said goods, further stated that before the said A. L. was indebted to the plaintiff for any goods or chattels, and at a time when no goods were delivered by the plaintiff to A. L. on credit, and when no money was due to the plaintiff from A. L., the defendant signed the following guarantee, “I hereby guarantee the payment of any sum or sums of money due to you from Mr. Andrew Little, of Richmond, the amount not to exceed at any time 100*l*.” The declaration then alleged the subsequent sale and delivery to A. L. of divers goods and chattels upon credit, to the amount of 100*l*., and that although the time of credit and for payment had elapsed, and A. L. had not paid the amount when requested, of all which the defendant had notice, yet the defendant had not paid the said amount, &c.: Held, upon demurrer, that a future supply of goods sufficiently appeared, from the terms of the guarantee itself, to be the consideration of the defendant’s promise; and that at all events, supposing the terms to apply equally to a past as to a future consideration, evidence of the circumstances of the parties at the time when the guarantee was made, was admissible to explain its meaning; and that they, as appeared from the declaration, showed that a future consideration was meant. *Bainbridge v. Wade*, 20 Law J. (N. S.) Q. B. 7.

HABEAS CORPUS AD SATISFACIENDUM. See CASE.

**HIGHWAY.**—1. *Diverting*—5 & 6 Will. 4, c. 50—*Pulling down house, &c.*—By the General Highway Act, 5 & 6 Will. 4, c. 50, s. 82, two justices are empowered to order any highway to be widened, but such power is not to extend to pull down any house, &c. By s. 84 and subsequent sections, if it appears to two justices that any highway may be diverted, and the owner of the land through which the proposed new highway is to be made shall consent thereto, the said justices, upon proof of certain notices, and on the delivery to them of a plan describing the old and new highways, may certify that the proposed new highway is nearer or more commodious to the public; and this certificate, with the proof and plan so laid before them, is to be lodged with the clerk of the peace for the county, and read in open court at the next quarter sessions, and inrolled among the records of the court; and if no appeal against the certificate is made, or, being made, is dismissed, the quarter sessions may order the highway to be diverted, and the soil for such new highway to be purchased, “subject to such exceptions and conditions in all respects as is mentioned with regard to highways to be widened.” *Semble*, that the limitation as to not pulling down any house, &c., does not apply to



the case of diverting a highway, which must be done with the consent of the owner of the land through which the new road passes; but held (assuming it to apply to such a case) that where at the instance of A., and with his consent, the quarter sessions duly made an order that an existing highway should be diverted, and a new highway substituted through the lands of A., which the surveyors were thereby authorized to purchase for that purpose, with a proviso that in so doing the surveyors were not to pull down any house, &c., and the surveyors made the new road, not according to the plan deposited with the clerk of the peace, but as nearly on the site there delineated as was practicable without pulling down a house, that the statutory power for diverting the old highway had not been properly carried out. Held, also, that the proviso rendered the order of sessions bad on its face, for throwing that upon the discretion of the surveyors, who are ministerially to execute what is in truth a restraint upon the power of the magistrates, who are to order, and that if it were rejected the new highway would not be made in pursuance of the order. *Reg. v. Newmarket Railway Company*, 19 Law J. (N. S.) Q. B. 519.

2. *Liability to repair—Indictment—Description in—Breach of duty by turnpike trustees.*—By a local act, passed in 1823, which was to be in force for twenty-one years, and the preamble of which stated that the making and maintaining a certain turnpike road would be of advantage to the public at large, certain trustees were appointed, who were enabled to make the turnpike road, and required to erect sufficient fences where it passed through private lands. The act did not expressly declare that the road should be a highway, but it enabled all persons to use it on payment of toll. Part of the turnpike road was formed upon an existing road, which had been made under a local inclosure act, but which had never been declared to be completed, as provided by 41 Geo. 3, c. 149, s. 9. The turnpike road was completed and opened to the public in 1833, and had for fourteen or fifteen years since that time been used by the public, and a coach had at one time travelled over it. Part of the road passed through the parish of L., and was out of repair. No repairs had ever been done upon it by the parish. While the Turnpike Act continued in force an indictment was preferred and found against the parish of L. for non-repair: Held, that the road was a common Queen's highway, which the parish was liable to repair, the user and the preamble of the statute showing it to be beneficial to the public. That the indictment sufficiently described it as a common Queen's highway, without reference to its temporary nature under the Turnpike Act, or the payment of toll. That the want of compliance with the provisions of the 41 Geo. 3, c. 149, s. 9, though it rendered the road under the Inclosure Act a highway, but not repairable by the parish, did not prevent it from having all the incidents of a common highway when adopted and used by the turnpike trustees. That a breach of duty by the trustees, in not making the road of a proper width or erecting sufficient fences, was no answer to the indictment. Evidence was offered by the defendants at the trial to show that

although the road had been opened to the public and used by them, it had never been fully completed according to the requirements of the Turnpike Act: Held, that such evidence was properly rejected as irrelevant. *Reg. v. Inhabitants of Lordsmere*, 19 Law J. (N. S.) Q. B. 430.

**INCLOSURE ACT.**—*Feigned issue.*—An award made by an assistant inclosure commissioner, that a certain common was within the manor of L., was removed into the Court of Queen's Bench by certiorari, on the application of the lord of the manor of E., who claimed the common to be parcel of his manor. On his expressing himself dissatisfied with the award, and requiring to have the matter tried by a feigned issue, and stating as the ground of his dissatisfaction that the award was wrong, and setting forth the evidence in support of his claim, the court directed the trial of a feigned issue under the stat. 8 & 9 Vict. c. 118, s. 44, to determine the disputed question of boundary. *Reg. v. Kelsey*, 19 Law J. (N. S.) Q. B. 523.

**INTERPLEADER.** See PLEADING.

**JOINT-STOCK COMPANY.** See JUDGMENT IN CASE OF NONSUIT.

**JUDGMENT DEBT.**—*Order—County Court.*—An order of the judge of a County Court, made upon a summons after judgment, under the 9 & 10 Vict. c. 95, s. 99, ordering that the defendant shall pay an instalment of a judgment debt upon a future day, or in default be committed, is invalid. *Abley v. Dale*, 1 Q. B. P. 626.

**JUDGMENT AS IN CASE OF A NONSUIT.**—*Excuse for not proceeding to trial—Joint-Stock Companies Winding-up Act.*—An action to recover compensation for services rendered to the defendant as a member of the provisional committee of a railway company, after notice of trial given, stood for trial as a special jury cause for the sitting after Hilary Term, 1850. In the November previous, the Vice-Chancellor had made an order for winding up the affairs of the company under the Joint-Stock Companies Winding-up Act, 11 & 12 Vict. c. 45. An official manager was appointed some time in January, 1850. After his appointment the plaintiffs withdrew the record, stating their intention of carrying in their claim and proving it before the master in chancery. The defendant having moved for judgment as in case of a nonsuit, for not proceeding to trial at the sittings after Hilary Term, the Court discharged the rule, holding that as by sect. 73, after the appointment of an official manager the plaintiffs were bound to prove their debt before the master before they could proceed with the action, and as they had not been shown to have been guilty of any neglect or delay in making such proof, they had given a reasonable excuse for not proceeding to trial. *Birch v. Lowndes*, 19 Law J. (N. S.) Q. B. 431.

**JUDGMENT, FOREIGN.** See COLONIAL LAW. PRACTICE.

**JURAT OF AFFIDAVIT.**—The jurat of an affidavit was in the following form:—"Sworn by" "at Glasgow, in the county of

Lanark, in Scotland, the fifth day of June, 1850, years before me," G. R. T., "a commissioner for Scotland, for taking affidavits in the Court of Queen's Bench, at Westminster: Held, that the date and the authority of the commissioner were sufficiently stated. The privilege of a plaintiff suing in formâ pauperis does not extend to a step collateral to the cause, such as a rule calling on his attorney to pay the costs of the day incurred through his negligence. *Bell v. Port of London Assurance Company*, 1 Q. B. P. 691.

**JUSTICES OF THE PEACE.**—*Excess of jurisdiction—Trespass*—11 & 12 Vict. c. 44.—The declaration contained two counts, one for assaulting and imprisoning the plaintiff, and the other for seizing his goods. The defendants were justices, and had convicted the plaintiff, under 6 & 7 Vict. c. 68, for illegally performing stage plays. The conviction (which had been quashed by the sessions) contained no adjudication of costs, but the warrant of distress (which was not made returnable at any time certain) recited the conviction as adjudging costs besides the penalty. The 19th section of the 6 & 7 Vict. c. 68, provides, that in default of payment of any penalty, together with the costs, the same may be levied by distress, and for want of sufficient distress that the offender may be imprisoned. After the adjudication by the defendants, and before any distress warrant issued, the plaintiff was, by a verbal order of the defendants, detained in custody for the purpose of enforcing payment of the penalty, and afterwards the penalty and costs were levied by distress of his goods: Held, that the imprisonment was not authorized by the 5 Geo. 4, c. 18, as it was not for the purpose of ascertaining whether the plaintiff had any goods whereon the distress could be levied, and as the warrant named no day for its return. *Quære*, whether a verbal order to detain, under the 5 Geo. 4, c. 18, is valid: Held, also, that the 6 & 7 Vict. c. 68, s. 19, did not authorize a distress for costs when they were not adjudged by the conviction: Held, also, that there being an excess of jurisdiction by the defendants, an action of trespass might be maintained against them under the 11 & 12 Vict. c. 44, s. 2. *Leary v. Pattrick*, 19 Law J. (N. S.) Q. B. 425.

**LANDS CLAUSES CONSOLIDATION ACT, 8 & 9 VICT. c. 18.**—Under the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, if a question of disputed compensation be submitted to arbitration under ss. 23, 25, and an umpire be appointed under sect. 28 by the Board of Trade (or Railway Commissioners since stat. 9 & 10 Vict. c. 105), and the submission be made a rule of court under sect. 36, the court has jurisdiction to set aside the award of the umpire, though neither the appointment of the umpire nor his award be made a rule of court. It is no objection, under sect. 63, to the award of such umpire, made under sect. 28, that the price of the land and the compensation for damage by severance, though each is expressly claimed, are assessed in a gross sum. A claimant in respect of land of which he is tenant in fee, cannot object that the award assesses the compensation, on the assumption that he is in possession,

whereas it is occupied by a lessee. The court will not entertain the objection that the award is contrary to the evidence. A company, under sect. 25, appointed an arbitrator on 23rd March; the claimant, another on 6th April. The arbitrators neglected, seven days after request by the company, to appoint an umpire, on which the company applied to the railway commissioners, and they appointed an umpire on 17th May: Held, that such appointment was in time. The umpire and arbitrators made their declarations under sect. 33 on 27th May, before the umpire entered upon the matters referred: Held, that no objection arose from the lateness of these declarations. The umpire made his award on 23rd July: Held, not too late, he having three months for that purpose, under sect. 23, from the time of the duty devolving on him. *Bradshaw v. The East and West India Docks and Birmingham Junction Railway Company*, 12 Q. B. 562.

LEASE.—1. *Tenancy from year to year*—*Statute, construction of—Notice to quit*.—By the 7 & 8 Vict. c. 76, s. 4, (since repealed by 8 & 9 Vict. c. 106,) it is provided that no lease in writing “shall be valid as a lease unless the same shall be by deed, but any agreement in writing to let any land shall be valid and take effect as an agreement to execute a lease, and the person who shall be in possession of the land in pursuance of any agreement to let may, from payment of rent or other circumstances, be construed to be a tenant from year to year: Held, that the meaning of the statute is, that the person in possession under the lease (which is thereby turned into an agreement to let) is to be deemed, from payment of rent or other circumstances, a tenant from year to year, not indefinitely, but only for the term specified in the agreement. Where, during the operation of that statute, by an agreement (not under seal), A. agreed to let to B. premises for three years, from Michaelmas, 1845, with a power for B. six months previous to the end of the said term of three years, by a notice to that effect, to renew the tenancy for a further term of three years, and B. entered and paid rent and gave due notice of his desire to renew, but no further lease was granted: Held, that a tenancy from year to year was created, determinable during the three years by a notice to quit, but expiring at the end of that period by effluxion of time, when A. might recover in ejectment without giving any notice to quit. *Doe d. Devenish v. Moffatt*, 19 Law J. (N.S.) Q. B. 438.

2. *Condition of re-entry*.—Where land is demised subject to a condition for re-entry on default in payment of the rent, the right of re-entry does not accrue until the rent has been duly demanded. *Hill v. Kempshall*, 7 C. B. 975.

LIEN.—*Livery stable keeper*.—A livery stable keeper has no lien upon a horse standing at livery in his stables, in respect of monies paid to a veterinary surgeon for blistering the horse according to the owner's directions. *Orchard v. Rackstraw*, 19 Law J. (N. S.) C. B. 303.

And see ATTORNEY.

**LIMITATIONS.**—*Fee-farm rent, under the 3 & 4 Will. 4, c. 27, s. 42.*—The 42nd section of the 3 & 4 Will. 4, c. 27, is not repealed by the 3 & 4 Will. 4, c. 42, s. 3. A. was from the 2nd of July, 1805, till the 10th of July, 1841 (when he was found a lunatic), and B. his committee had ever since been, seised as of fee of two-thirds of a fee-farm rent of 20*l.* 5*s.* per annum, payable on the 29th September and 25th of March, created by letters patent of the 29 Hen. 8. No payment of this rent or of any part thereof had been made since March, 1831, nor had there been any acknowledgment in writing relating thereto: Held, that the case was governed by the 42nd section of the 3 & 4 Will. 4, c. 27, and consequently that neither the lunatic nor his committee was entitled to recover any arrears of the rent after the expiration of six years from the 29th September, 1831. *Humfrey v. Grey*, 7 C. B. 567.

**LIVERY STABLE.** See LIEN.

**LOTTERY.** See COMPANY.

**MANDAMUS.**—1. *Appeal.*—The 156th section of a local sanitary act (9 & 10 Vict. c. cxxvii.) enacts, that “the net annual value of property to be rated under the act shall be ascertained according to the meaning of the words ‘net annual value’ in the 6 & 7 Will. 4, c. 96. and shall be ‘estimated according to such value as the same is’ ‘rated’ ‘for the relief of the poor in the year preceding:’” Held, that the poor rate of the preceding year was conclusive evidence of the net annual value, notwithstanding that sect. 158 directs, that where property is omitted in the poor rate or has increased in value since the poor rate a new valuation is to be made, and sects. 170 and 171, which give the appeal, invest the sessions with the same powers as to amending or quashing rates as are by law vested in sessions as to poor rates. The sessions having so decided, and refused to hear any further evidence: Held, on application to this court for a mandamus, that the dismissal of the appeal was not a declining of jurisdiction, but a decision upon the hearing of the appeal, and therefore that this court would not issue a mandamus, even if the construction put upon the act were wrong. *Reg. v. Recorder of Liverpool*, Q. B. P. 682.

2. *Jurisdiction—Inferior tribunal.*—A statute provided that if the election of certain deputies should be objected to, and notice in writing should be given or delivered to the party objected to four days before the first meeting, it should be lawful for the deputies assembled at such meeting (exclusive of those objected to), and they were required, to inquire into and determine the validity of such disputed election. Where proof was given that notice of objection had been in due time served on the wife of the party objected to at his dwellinghouse, and the meeting decided that personal service was essential, and refused to inquire into the election: Held, that there had been a mistake of the law and a declining of jurisdiction, and that consequently a mandamus to inquire should be issued. But, where evidence was given of personal service of a notice upon the

party objected to in due time, but the meeting disbelieved the witness and decided that the disputed election was valid: Held, that the deputies having decided upon a question of fact over which they had jurisdiction, their decision was final, and that the Court of Queen's Bench could not interfere. *Reg. v. Goodrich*, 19 Law J. (N. S.) Q. B. 413.

And see CHORISTER.

**MARINE INSURANCE.**—*Time policy—Actual or constructive total loss—Notice of abandonment—Liability of underwriters.*—To entitle the assured to recover under a policy of insurance upon a ship as for a constructive total loss, where no such urgent necessity is shown as rendered a sale of the ship by the master valid as against the insurers, there must have been due notice of abandonment to the insurers. Whether a notice of abandonment may be dispensed with, where there has been a sale by the master, under such urgent necessity as to make the sale valid as against the insurers, *quære*. Under a time policy upon a ship, a claim for partial loss, occasioned by a peril insured against during the continuance of the risk, may be recovered, although the extent of the damage done to the ship be not ascertained until after the expiration of the time insured against. A total loss for which the insurers are not liable, following a partial loss occasioned by the perils insured against, has not the effect of exempting the insurers from liability for such partial loss, where it continues prejudicial to the assured. A ship, insured for 1000*l.* by a time policy, ending on the 23rd of September, 1846, whilst endeavouring to make the harbour of Santa Cruz, on the 16th of September, 1846, got aground, and so remained for some time until the flowing of the tide, when she was got off, and taken into the harbour. There she continued discharging her cargo, and without any injury until the middle of October, when she was beached, and surveyed, and then for the first time it was discovered that she had received considerable damage from the accident of the 16th September. It was found impracticable either to repair her at Santa Cruz or to take her to any place where she could have been prudently repaired, and ultimately she was sold by the master for 72*l.* No notice of abandonment was given to the underwriters: Held, in an action of covenant upon the policy, that there had been no actual total loss, and that the underwriters were not liable as for a constructive total loss, but that they were bound to indemnify the assured to the amount of the partial loss which the ship had sustained from the accident of the 16th of September. *Knight v. Faith*, 19 Law J. (N.S.) Q. B. 509.

**MARKET-OVERT.** See TROVER.

**MARRIAGE, BREACH OF PROMISE OF.**—*Consideration for promise of marriage by a married man.*—In an action for breach of promise of marriage, the declaration alleged, that, in consideration that the plaintiff had promised to marry the defendant, the defendant promised to marry her; that the plaintiff continued and still is unmarried, and until the discovery of the defendant's mar-



riage was ready and willing to marry him ; that, after the defendant's promise, the plaintiff discovered that the defendant was and still is married, and that the plaintiff had not, at the time of the defendant's promise, any notice of the defendant's then marriage: Held, on motion in arrest of judgment, that the declaration was good, and that the plaintiff's remaining unmarried was a sufficient consideration for the defendant's promise to marry her. Dictum, per Pollock, C. B., that a promise by a married man to a woman to marry her after his wife's death is illegal. *Millward v. Littlewood*, 20 Law J. (N. S.) Exch. 2.

**MASTER AND SERVANT.**—*Wages—Election to affirm or rescind contract.*—The plaintiff was hired by the defendant at a yearly salary, payable quarterly, and was wrongfully dismissed by the defendant in the middle of a quarter. He then brought an action against the defendant, declaring in a special count for breach of the agreement, and in indebitatus assumpsit for the wages due for the year during which he had actually served. The plaintiff in this action recovered the wages for the year, and also on the special count damages for the dismissal, but the jury expressly omitted to give any damages for the broken quarter. He afterwards brought indebitatus assumpsit for work and labour to recover a proportional part of the quarter's salary up to the day of dismissal: Held, that the second action could not be sustained, as he had by the previous action elected to treat the contract as existing, and had recovered damages for its non-performance, and could not afterwards treat it as rescinded, and recover on a quantum meruit: held, also, that this defence was open under non assumpsit, as, under the circumstances, no debt had accrued. The damages in the former action should have been calculated to include the wages for the broken quarter. *Goodman v. Pocock*, 19 L. J. (N. S.) Q. B. 410.

**MINE.** See EASEMENT.

**MISJOINDER.** — *Contract and tort.* — The third and fourth counts of a declaration set forth certain promises of the defendant for a good consideration, and not connected with any common law duty arising from the relation between the plaintiff and the defendant, and then alleged a breach of duty in the defendant, consisting solely in the neglect to do the acts which he had by such promises agreed to do, the plaintiff having performed his part of the agreement. The last count was in trover: Held, on general demurrer, that the declaration was bad for misjoinder. The case of *Boorman v. Brown*, 3 Q. B. Rep. 511; S. C. 11 Law J. Rep. (N. S.) Exch. 437, and 11 Cl. & F. 1, does not decide that the neglect to perform a contract is in every case a breach of duty for which an action of tort will lie. *Courtney v. Earle*, 20 L. J. (N. S.) C. B. 7.

**MONEY PAID.** See BILL OF EXCHANGE.

**MUNICIPAL CORPORATION.**—*Costs—Borough fund—Town clerk—Quashing order for payment of money.*—Although a town clerk, who has acted as solicitor to a municipal corporation,

cannot recover his professional costs against them in an action without proving a retainer under the corporate seal, yet where an order for payment of such costs has been made by the town council, the mere absence of a retainer under seal will not be a sufficient ground for quashing the order under 7 Will. 4 & 1 Vict. c. 78, s. 44, if the costs were incurred under resolutions of the town council. Where a town council, having made a borough rate, proceeded to enforce its payment, but were threatened with litigation if they persevered, and in consequence directed their town clerk to consult counsel and take measures to ensure them against the threat: Held, that the costs occasioned thereby were properly chargeable upon the borough fund under 5 & 6 Will. 4, c. 76, s. 92. The town clerk was appointed to his office on the basis of a report which fixed his salary at 250*l.* a-year, and defined his duties to be (inter alia) "to prepare all precepts, orders and other documents required for laying borough rates, to abide by and see that all orders of the council are properly carried out, and all necessary documents prepared for so doing, and to act as the professional adviser of the mayor and council in the business of the council;" and it also provided "that he be paid the usual professional charges for conducting or opposing bills in parliament, conducting actions or suits, &c., preparing leases, &c., and also he be paid all travelling and other expenses out of pocket: Held, that he was entitled to be paid all such extra costs as were bonâ fide incurred for the purpose of warding off threatened litigation, whether litigation did or did not in fact result. *Reg. v. Prest*, 20 Law J. (N. S.) Q. B. 17.

**NAVIGATION ON THE THAMES.—Pleading.**—Case for so negligently and unskilfully navigating a vessel on the river Thames, of which the defendant had the care and management, that she struck against and damaged a wharf and jetty belonging to the plaintiff. Plea, amongst others, that the wharf and jetty were a construction within the flow of the tide and below low water-mark, and obstructed part of the bed and course of the river, which was a common and public navigable river and highway for all the queen's subjects to navigate over and along at their free will and pleasure; that the said wharf and jetty had been constructed by the plaintiff, and unlawfully and wrongfully obstructed the navigation over the said part of the river, to the common nuisance of the queen's subjects, and that they could not pass, &c., without damaging the said wharf and jetty as in the declaration mentioned; that the plaintiff had notice of the premises, but wilfully continued the said nuisance; that the defendant had occasion to pass with the said vessel over the said part of the river, and in so passing did the alleged damage, and that he managed and navigated the said vessel with all the skill and care which would have been due and proper had not the said part of the river been obstructed as aforesaid, and that he did no unnecessary damage. Replication, de injuriâ, and a verdict for the defendant: Held, that the plea, though in substance sufficiently proved at the trial, was bad for not alleging a necessity to navigate the vessel over

the part of the river where nuisance existed, nor even that the defendant's right course was over such part of the river, and that he could not have avoided the nuisance, by taking any other course, with reasonable convenience, and therefore that the plaintiff was entitled to judgment non obstante veredicto. *Dimes v. Petley*, 19 L. J. (N. S.) Q. B. 449.

**NEGLIGENCE.** — *Master and servant* — *Sub-contractor* — *Nuisance*.—A., having contracted with a railway company to construct a branch line, made a sub-contract with F. and H. to erect a bridge for part of the line. C., who was foreman to F. and H. at a salary of 250*l.* a-year for attention to their general business, contracted with F. and H. for a specific additional sum to erect the necessary scaffolding for the bridge, F. and H. furnishing the materials, the gas lights included. One of the poles of the scaffolding rested upon a sleeper which was on the highway and above the level of the pavement. In consequence of the want of sufficient light to show the obstruction, the plaintiff fell against the sleeper and was injured. Subsequent to the accident additional lights were put up at the expense of F. and H.: Held, that F. and H. were not liable, but that the plaintiff's remedy lay against C. *Knight v. Fox and Henderson*, 20 L. J. (N. S.) Exch. 9.

**NEW TRIAL.** See PRACTICE.

**NUL TIEL RECORD.** See PRACTICE.

**ORDER.** See BASTARDY.

**PATENT.**—*Scire facias*—*Evidence*.—A declaration in scire facias to repeal a patent "for improvements in instruments used for writing and marking and in the construction of inkstands" contained suggestions alleging want of novelty and utility in "a certain part" of the said invention, and that the defendant had not properly described the said invention, &c. The pleas denied all the suggestions in the declaration. Objections were filed with the declaration under the 5 & 6 Will. 4, c. 83, s. 5, specifying (inter alia) claim No. 6 in the specification as objected to for want of novelty and utility. After issue joined, the defendant procured to be inrolled a disclaimer under the 5 & 6 Will. 4, c. 83, s. 1, disclaiming (inter alia) the claim No. 6. The claims not disclaimed were for improvements in pen-holders and pencil-cases, and in the construction of inkstands; those disclaimed were for pens, and instruments used for marking with a stamp: Held, first, that such disclaimer, though inrolled subsequently to issue joined, was admissible for the defendant, and to be read as part of the original specification put in by the prosecutor; secondly, that it was not necessary to plead the disclaimer puis darrein continuance; thirdly, that the objections filed with the declaration under the 5 & 6 Will. 4, c. 83, s. 5, are not part and parcel of the record so as to be incorporated with the issues, and show that those specific objections are in issue, and that therefore it could not be taken that issue had been joined upon the objections which went to the

disclaimed parts of the invention, and that those issues must therefore be tried; fourthly, that the disclaimer, being admitted, proved the issues as to a "certain part" of the invention not being new or useful, in favour of the defendant, the prosecutor at the trial having abandoned all objections, except to the sixth claim in the specification which had been disclaimed; fifthly, that the title of the patent as regarded "instruments used for writing and marking" was satisfied by the inventions for improvements in penholders and pencil-cases, which may be described as instruments used for writing and marking with pens and pencils. *Semble*, in actions or suits not being proceedings by scire facias, and which were not pending at the time of the enrolment of a disclaimer under the 5 & 6 Will. 4, c. 83, s. 1, the disclaimer is to be deemed and taken to be a part of the patent or specification from the time of the granting of the letters-patent, and not from the time of its enrolment only. *Reg. v. Mill*, 20 Law J. (N. S.) C. B. 16.

See COPYRIGHT OF DESIGN. COVENANT.

**PERJURY.**—*Indictment—Evidence.*—F. was committed for deposing, in an affidavit in a cause wherein he F. was plaintiff and E. defendant, that E. owed him 50*l.*: Held, that in support of this indictment evidence was not admissible that the cause of F. against E. was, after the making of the affidavit, referred by consent and an award made that E. owed nothing to F. *Reg. v. Fontaine Moreau*, 11 Q. B. 1028.

**PLEADING.**—1. *Agreement to demise fixtures.*—A declaration stated that the plaintiff agreed to let, and the defendant to take, for one year a certain dwellinghouse, together with the furniture, fixtures and effects mentioned in the inventory thereof, "which was to be examined or signed by both parties." And the defendant agreed at the end of the term to deliver up the dwellinghouse, furniture, fixtures and effects, "as per inventory aforesaid," in as good condition as the same were then in, or pay for the damage. The declaration then averred, that the defendant entered and enjoyed the house, furniture, fixtures and effects, and alleged as a breach, that at the end of the term the defendant delivered up the furniture, fixtures and effects, "as per inventory aforesaid," in a broken condition, and refused to pay for damage: Held, on special demurrer, that the declaration was good, although it contained no averment that the inventory was examined or signed by either party. *Dampier v. Pole*, 4 Exch. 678.

2. *Allowance of cross demands on account stated—Payment.*—Assumpsit by the drawer against the acceptor of bills of exchange amounting to 912*l.* Plea, that, after the accruing of the causes of action, an account was stated between the plaintiff and the defendant of and concerning the said causes of action, and certain other demands of the plaintiff against the defendant, and certain other demands of the defendant against the plaintiff; and that 50*l.*, and no more, was found to be and was then due from the defendant to the plaintiff, which said sum the defendant paid to the plaintiff in satisfaction of the sum so due: Held, on special demurrer, a good answer and well pleaded;

for the plea in effect set up the allowances in account by way of partial payment, and an actual payment of the residue. *Callander v. Howard*, 19 Law J. (N. S.) C. B. 312.

3. *Bill of exchange—De injuriâ.*—To an action by the payee against the acceptors of two bills of exchange, the defendants pleaded a plea, alleging that the bills were accepted by them and one A. B., not by them alone, and that before the bills were due, and before the delivery to the plaintiff, it was agreed between the drawers and the defendants and A. B., that, in consideration of the defendants and A. B. paying the drawers 500*l.* in settlement of accounts, the drawers would accept a dividend of 2*s.* 9*d.* in the pound on these and other bills accepted by the defendants and A. B., and within one month would deliver up the bills, receiving the dividends on each acceptance; that a place for the tender of the composition was agreed upon, and a penalty of 500*l.* agreed to be paid on default on either side; that the 500*l.* in settlement of accounts were paid to the drawers, and the composition duly tendered within the month; and alleging a refusal by the drawers to accept the sum tendered, or to deliver up the acceptances, and delivery of the bills to the plaintiff in fraud of the agreement, and that the plaintiff took and holds the bills with notice of the premises. Replication, *de injuriâ*, and special demurrer. *Semble*, that the plea contained no defence to the action; but assuming that it did: Held, that the replication *de injuriâ* was good on special demurrer; the defence being one which, before the new rules, might have been raised under *non assumpsit*. The defendants also pleaded that, after acceptance by the defendants and A. B., it was agreed between the plaintiff, through the drawers as his agents, and the defendants and A. B., (as in the former plea, except that the plaintiff bound himself to accept the dividend of 2*s.* 9*d.*, and deliver up the acceptances instead of the drawers,) that the defendants and A. B. paid to the drawers, and they accepted the 500*l.* in settlement, and the defendants and A. B. tendered the dividend, of all which the plaintiff had notice; that the plaintiff refused to accept the dividend, and failed to deliver up the acceptances. The replication denied the agreement between the plaintiff, by the drawers as his agents, and the defendants and A. B., *modo et formâ*: Held, that the plea was bad in substance, as it contained no allegation that the agreement to accept the dividend was accepted by the plaintiff in satisfaction or substitution of the agreement on the bill, and it was consistent with the plea that the plaintiff may have elected to pay the penalty of 500*l.* for default in performance of the agreement. *Quære*, whether the replication was not bad as putting in issue not only the agreement, but the agreement by the drawers as the plaintiff's agents. *Buttigreg v. Booker*, 19 Law J. (N. S.) C. B. 330.

4. *Bond—Condition—Interpleader order.*—A bond given to the plaintiffs under an interpleader order, by two defendants, as security for a claimant of goods seized at the suit of the plaintiffs, contained a condition, that if at the trial of the issue the goods should be found to have been the property of the claimant, or if he should "proceed to

try," according to the order or any further order, or should pay the value of the goods, the bond should be void. The declaration, after setting out the condition, stated that when the issue came on to be tried the parties agreed to withdraw a juror; that afterwards a judge's order was made, directing the claimant to proceed to trial at a certain sittings, and that he did not proceed to trial or try: Held, that the declaration was good; that the condition meant that the claimant should try, and was not satisfied by the first proceeding to trial; and that there was a sufficient breach. A plea, therefore, which stated that the claimant did proceed to trial, and that a juror was withdrawn, was held bad, as raising an immaterial issue. *Williams v. Gray*, 19 Law J. (N. S.) C. B. 382.

5. *Conditions precedent—Averment of performance of—Charterparty.*—In an action on a charterparty the declaration stated, that by a charterparty, made between the defendant, the shipowner, and the plaintiffs, it was agreed that the ship should proceed to two ports in Sicily, or usual place of loading, on and after the delivery of her outward cargo, and there load from the plaintiffs' factors a full cargo, and thence proceed to Bristol, and that the vessel should have her orders before leaving Messina. Averment, that the ship arrived at Messina. Breach, that the defendant, within a reasonable time after the delivery of her outward cargo, and before the plaintiffs could have given orders for the ship to proceed to the said ports, made a contract with other persons for the conveyance of goods from Messina, and therewith and within such reasonable time as aforesaid, and before such reasonable time had elapsed, loaded his ship and afterwards proceeded to London, without taking on board the cargo agreed to be taken from the plaintiffs, and thereby wholly incapacitated and deprived himself of the power of fulfilling the charterparty, although the plaintiffs within such reasonable time as aforesaid provided merchandize, and were ready and willing to load on board the said ship the said merchandize; and although the plaintiffs would have been ready and willing to have named and appointed and given orders to the defendant to proceed to two ports and to have there loaded a full cargo: Held, that the declaration was bad for not showing performance by the plaintiffs of the conditions precedent of tendering a cargo, giving orders and naming a port, or not showing a sufficient excuse for nonperformance thereof. *Matthews v. Lowther*, 19 L. J. (N. S.) Exch. 364.

6. *Contract—Averments.*—The declaration stated that the defendant agreed that he and his wife should for three months perform as equestrians on the stage and in the ring in all entertainments which might be produced at A. or elsewhere under the direction of the plaintiff in such parts as the plaintiff should require, and should attend all calls and rehearsals; that although the plaintiff had an establishment at P. under his direction, for equestrian entertainments, and although the plaintiff required the defendant and his wife to join the plaintiff's establishment at P. for the purpose of performing in entertainments to be produced there, and although a reasonable



time for joining elapsed before the suit, yet the defendant and his wife did not join or perform in the entertainments to be produced at P. &c. : on demurrer, the declaration was held good, inasmuch as it sufficiently appeared that the requisition by the plaintiff was to appear and perform as equestrians on the stage or in the ring ; also that as the writ appeared to have been issued within three months from the making of the contract, it was sufficiently shown that reasonable time had elapsed after the notice and within the three months ; also that the breach was good, showing substantially an entire refusal to perform the contract. *Batty v. Melillo*, 19 L. J. (N. S.) C. B. 362.

7. *Contract for payment of freight.*—Where the indorsee of a bill of lading, or the consignee, other than the original charterer, becomes liable for freight, such liability results, not from the original contract of affreightment, but from a new contract, the consideration for which is the delivery of the goods. Therefore, in an action of assumpsit for freight, brought within a limited jurisdiction, and grounded on such liability, the declaration is sufficient if it state as consideration a delivery on request, averring such delivery to have taken place within the jurisdiction, though the goods are not alleged to have been carried within it. And where, in such an action, the declaration stated that defendant was indebted to plaintiff for freight due to him for the carriage of certain goods by plaintiff before that time carried in a ship called, &c., from M. to H., and there delivered to defendant within the jurisdiction at defendant's request: Held, that the delivery and request, though not the carrying, appeared to have taken place within the jurisdiction, and that the count was good. *Kemp v. Clark*, 12 Q. B. 647.

8. *Covenant—Plea of general performance—Assigning breach in replication—Lease—Condition precedent—Judgment.*—It is a general rule of pleading, and not confined to actions on bonds, that where a defendant, in order to have a complete defence to the action, ought to have performed all of a large number of covenants, and the breach of any one of them would entitle the plaintiff to succeed, the defendant may plead performance of all generally ; and the plaintiff in his replication must then specify some particular breach, concluding with a verification, and cannot take issue on the general averment of performance. A lease for forty-two years contained a proviso that if the lessee should desire to quit at the end of the first eight years, and should give eighteen months notice beforehand of such desire, then and in such case, all arrears of rent being paid and all covenants and agreements on the part of the lessee having being observed and performed, the lease should at the expiration of the eighth year cease, determine and be utterly void, as if the whole term of forty-two years had run out. The proviso concluded thus, "but nevertheless without prejudice to any claim or remedy which any of the parties hereto or their respective representatives may then be entitled to for breach of any of the covenants or agreements hereinbefore contained : " *Semble*, that the payment of the rent and the

performance of the covenants was not a condition precedent to the tenant's right to determine the lease at the end of the eighth year, since the latter branch of the proviso contemplated that breaches of covenant might exist, for which the lessor might have to sue after such determination of the lease. A declaration in covenant on the lease stated various breaches. The defendants pleaded that the breaches happened after eight years of the lease had expired, and that they had determined the lease by a notice at the end of the eight years. The plaintiff replied to the plea, and also new assigned that certain of the breaches were committed within the eight years. The defendants demurred to the replication and traversed the new assignment. After judgment for the plaintiff, that the replication was sufficient in law, the jury assessed separate damages on the breaches and on the issue in law, and 1s. damages on the new assignment. On a writ of error brought, the Court of Exchequer Chamber decided that the replication was bad in law: Held, that the judgment must be reversed altogether, and that the Court of Error could not without the consent of the plaintiff below, the defendant in error, reverse the judgment as to the demurrer and affirm it as to the causes of action contained in the new assignment. *Grey v. Friar*, 19 L. J. (N. S.) Q. B. 393.

9. *Debt against sheriff for extortion.*—*Semble*, that in debt against the sheriff, under the 29 Eliz. c. 4, to recover treble damages for taking greater fees than are allowed by that act on several different writs of fi. fa., it is not sufficient to allege generally that the defendant took £ , being a larger sum, &c., but the declaration should state what he ought to have taken and what was the excess on each writ. *Berton v. Lawrence*, 1 Q. B. P. 668.

10. *Declaration on deed executed by bailiff to sheriff—Pleading over.*—By a deed executed by defendants, W. T., a bailiff and two sureties, to plaintiff, the sheriff, the defendants covenanted to save harmless the plaintiff from any action brought against him "touching or concerning any matter wherein the said bailiff shall act or assume to act as bailiff," or "for or by reason of any extortion or escape happening by the act or default of the said bailiff." The plaintiff in declaring on this, after stating an escape, alleged that it happened "by the default of the defendant W. T., and not otherwise, he the defendant W. T. then being bailiff of the said plaintiff as such sheriff." The defendant, after craving oyer of the bond, pleaded that the default "was not a default of him the said W. T. as such bailiff of the plaintiff:" Held, first, that the plea was bad on special demurrer for ambiguity; and, secondly, that although the declaration was, *semble*, bad on special demurrer for not showing that the default was a default of W. T. as bailiff, it was sufficient after pleading over. *Cubitt v. Thompson*, 1 Q. B. P. 672.

11. *Departure—Promissory note—Indorsee and indorser—Replication.*—Indorsee against indorser of a promissory note made by E. B., payable to O. M., and indorsed by O. M. to the defendant, and by the defendant indorsed to the plaintiff. Plea, that O. M. and

the plaintiff were one and the same person. Replication, that E. B. was indebted to the plaintiff in 23*l*., and thereupon it was agreed between E. B. and the plaintiff, that E. B. should give to the plaintiff the promissory note on account of such debt, and that the plaintiff should give (which he accordingly did) time to E. B. for payment of the said debt until the promissory note became due and payable, provided E. B. would procure the defendant to indorse the promissory note to the plaintiff by way of security and guarantee to the plaintiff, of all which premises the defendant had full notice and assented and agreed thereto; and therefore, and in pursuance of the said agreement, the plaintiff without consideration or value indorsed the note to the defendant, in order that the defendant might indorse the same to the plaintiff; and the defendant did indorse as alleged in the declaration. Demurrer to the replication: Held, that the replication was not a departure from the declaration. *Morris v. Walker*, 19 Law J. (N. S.) Q. B. 400.

12. *Evidence—Bill of exchange—Collateral security.*—In an action on a bill of exchange drawn by W. upon and accepted by the defendant, and by W. indorsed to the plaintiff, the defendant pleaded that he accepted the bill and delivered it to W. as a security for a certain loan, and that certain scrip of the defendant was deposited with and received by W. as a collateral security with the said bill for repayment of the said loan, and upon the terms that any sums which should be received by W., or any person to whom he might indorse the bill and deliver the scrip, for or in respect of the scrip, should be taken to be in satisfaction pro tanto of the bill; that the plaintiff took the bill with notice of the agreement, and that while he held the bill upon the terms aforesaid, W. delivered to the plaintiff, and the plaintiff received the scrip upon and subject to the terms aforesaid; that W. indorsed the bill to the plaintiff after it became due, and that the plaintiff received it upon and subject to the same terms; that the plaintiff had received in respect of the scrip a sum equal to the amount of the bill and all damages, and that the said sum was thereupon accepted in full satisfaction and discharge of the causes of action. The plaintiff replied that the scrip was not delivered to or received by W. upon the terms alleged. The defendant gave in evidence a memorandum signed by W., and dated the same day as the bill, stating that the defendant “has this day deposited with me 220 shares in the H. Railway as a collateral security for the due payment of his acceptance”: Held (dubitante, Wightman, J.), that the evidence supported the plea. The date which appears on the face of a document is *prima facie* its true date. *Malpas v. Clements*, 19 Law J. (N. S.) Q. B. 435.

13. *Money had and received.*—A bond given after the 5 & 6 Will. 4, c. 76, and before the 6 & 7 Will. 4, c. 104, and the 7 Will. 4 & 1 Vict. c. 78, by a municipal corporation for money borrowed is good at law, although under the 92nd section of the first act it cannot be enforced against the borough fund. To a count for money had and received the defendants pleaded that they were a corporation under

the 5 & 6 Will. 4, c. 76, and that after that act and before the 6 & 7 Will. 4, c. 104, and the 7 Will. 4 & 1 Vict. c. 78, it was illegally agreed that the plaintiff should lend the defendants money and the defendants should give a bond; that the money was lent and the bond given, and the money had and received in pursuance of this illegal contract: Held, that the plea was bad on special demurrer as amounting to the general issue. *Semble*, that it would be a good plea in bar that no execution could issue on a judgment for the plaintiff in an action. *Pallister v. Mayor, &c. of Gravesend*, 19 Law J. (N. S.) C. B. 358.

14. *New assignment — Expulsion.* — The expulsion of a person from his dwelling-house is an injury to the dwelling-house. Declaration in trespass for breaking the plaintiff's dwelling-house, expelling the plaintiff and taking his goods. Pleas of liberum tenementum were pleaded as to the trespasses in and to the dwelling-house. The plaintiff replied, denying the pleas, and new assigning the expulsion: Held, on demurrer, that the new assignment was bad, as the pleas justified the expulsion as well as the breaking of the house. *Meriton v. Coombes*, 19 L. J. (N. S.) C. B. 336.

15. *Non assumpsit — Evidence.* — In an action for wages, a statement by the plaintiff that the claim which formed the subject-matter of the action had been referred, and that the arbitrator had made an award against him, is receivable on behalf of the defendant under the issue of non assumpsit. *Murray v. Gregory*, 19 Law J. (N. S.) Exch. 355.

16. *Plea that plaintiff appraised without license under stat. 46 Geo. 3, c. 43, s. 5.* — Assumpsit for work and labour. Plea that the work consisted entirely of an appraisement of personal property, which plaintiff appraised in expectation of reward without being licensed as is required by stat. 46 Geo. 3, c. 43, s. 5: Held, on special demurrer, that it was not necessary to allege, with reference to sect. 5, that plaintiff exercised the calling or occupation of an appraiser, or that he acted as such within the intent or meaning of the act, as the plea used the very words of sect. 4, that "every person who shall value or appraise for or in expectation of any hire," &c., "or reward," shall be deemed to be an appraiser; nor to negative exceptions either in a subsequent section of the same act (sect. 7, exempting a person licensed as an auctioneer), or in a subsequent act, 55 Geo. 3, c. 184, sched. pt. 1, Appraisement, exempting an appraisement made for the purpose of ascertaining the legacy duty, and the plea was good. *Palk v. Force*, 12 Q. B. 666.

17. *Plea to several counts — Conclusion.* — To a declaration in debt, containing a count on a bill of exchange for 12l. 10s., indorsed by the defendant to the plaintiff, and alleging the defendant had due notice of dishonour, and a count for goods sold and delivered, the defendant pleaded as to the first count, and as to 12l. 10s., parcel of the last count, that there never was more than 12l. 10s. due from the defendant to the plaintiff in respect of the debts in the introductory part of the plea mentioned, and that the defendant, after the accruing

of the debt in the last count and introductory part of the plea mentioned, indorsed to the plaintiff and the plaintiff received the said bill of exchange on account and in respect of the said debt and all causes of action in respect thereof, and that the defendant never had due notice of dishonour of the said bill of exchange as in the said first count alleged, concluding with a verification: Held, on special demurrer, that the plea was bad. *Day v. Smith*, 19 Law J. (N. S.) Q. B. 425.

18. *Rates*.—A declaration, after setting forth an agreement by which defendant took of plaintiff certain rooms, part of a messuage, and agreed to pay (without saying to whom) “the proportion of the rates,” &c. “which might be assessed on the premises so taken” by him, averred that afterwards, rates amounting, to wit, to 150*l.* were assessed on the messuage, being the rates whereof the proportion was agreed to be paid as aforesaid; and that such rates were afterwards assessed, became due, and were paid by the plaintiff; that the proper proportion payable by the defendant was a certain proportion, to wit, one-third, amounting, to wit, to 50*l.*, of all which defendant had notice, and was requested by the plaintiff to pay the said sum, nevertheless defendant disregarded, &c. Pleas, first, as to 12*l.* 10*s.*, tender and payment into court; secondly, as to residue, traverse of the request to pay; fourthly, as to residue, that the proper proportion payable by defendant was a certain proportion amounting to 12*l.* 10*s.*, without this, that the proper proportion was a certain proportion, to wit, one-third, amounting, to wit, to 50*l.*: Held, upon special demurrer to the second and fourth pleas, first, that the defendant was bound to pay his proportion of the rates to the plaintiff; secondly, that his liability to do so was a primary, and not a collateral liability, and therefore that no request to pay was necessary; thirdly, that, under the agreement to pay a proportion of the rates assessed on the premises so taken by him, he was bound to pay a proportion of the rates assessed on the messuage, of which such premises were a part; and, fourthly, that the fourth plea was bad, as traversing only the precise amount of the proportion in the declaration stated, which was immaterial. *Hooper v. Woolmer*, 1 Q. B. P. 634.

19. *Several pleas—Executor*.—A defendant sued as executor (on an affidavit that he was advised that he would be put to great difficulty if he were not permitted to do so) was allowed to plead *ne unques executor*, and also *plene administravit*. *Tyson v. Kendall*, 19 Law J. (N. S.) Q. B. 434.

20. *Trespass*.—Declaration in trespass charged that the defendants broke and entered plaintiff’s dwelling-house, and made a noise, &c., and also then broke open ten doors of plaintiff of and belonging to the said dwelling-house, and broke to pieces ten locks of the said ten doors, with which they were then fastened, and seized plaintiff’s goods. Justification under a *fi. fa.* by one defendant, alleging that he sued out the writ, and that by authority whereof the other defendant, being the sheriff, peaceably entered, the outer door being open, in order to seize and did then seize the goods then being in the said house, and



in so doing defendants unavoidably made some noise, &c., which are the trespasses, &c. On special demurrer: Held, the plea was bad, the breaking of the doors and locks being not aggravation merely, but a substantive trespass, distinct from the breaking and entering, and requiring to be justified, which was not done. Per Paterson, J., if the breaking and entering and breaking the doors and locks were all one act, the plea as to these amounted to not guilty. *Curlew v. Laurie, Chaplin and Temple*, 12 Q. B. 640.

And see ARBITRATION. BANKRUPTCY. BRIDGE. CASE. COLONIAL LAW. EASEMENT. MARRIAGE. NAVIGATION ON THE THAMES. USURY.

**POLICE MAGISTRATE, METROPOLITAN.**—*Information by poor law auditor.*—A metropolitan police magistrate, sitting alone, has jurisdiction to hear and determine an information by the auditor of a metropolitan poor law district for nonpayment of disbursements regularly disallowed and surcharged by such auditor, and certified to the poor law commissioners under the 7 & 8 Vict. c. 101, s. 32, where such information is laid within nine calendar months from the time of the disallowance, as required by the 12 & 13 Vict. c. 103, s. 9, although not until after the limitation of six calendar months mentioned in the 2 & 3 Vict. c. 71, s. 44, has expired. *Reg. v. Tyrwhitt*, 19 Law J. (N. S.) Q. B. 526.

**PRACTICE.**—*Affidavit.*—1. Where the jurat of an affidavit, upon which a rule nisi had been obtained, was, Sworn by A. B., the above-named deponent, at my chambers, Roll's Gardens, Chancery Lane, dated the 24th of April, E. V. Williams: Held, that the jurat was defective so as to prevent the affidavits being used; but in discharging the rule the court refused to allow costs, and gave leave for a second application upon an affidavit of the same facts, with a proper jurat. *In re Lloyd*, 19 Law J. (N. S.) Q. B. 457.

2. *Amendment.*—Where, in the exemplification of a recovery, the name of the demandant had been inserted by mistake as that of the tenant, and vice versâ, and the deed leading the uses being produced in court showed this, the court declined to amend, holding that the defect was cured by the 3 & 4 Will. c. 74, s. 8. *Wickens v. Sir John Shelley*, 19 Law J. (N. S.) C. B. 329.

3. *Auditâ querela, writ of.*—A writ of auditâ querelâ, founded upon a release, should be obtained by motion in open court, upon an affidavit of the facts, and where the defendant obtains the writ without such affidavit the court will set it aside. *Dearie v. Ker*, 4 Exch. 82.

4. *Case—Trees.*—In case in the nature of waste, by a reversioner against a tenant for life, for cutting down timber, &c., a count alleged, that by the custom of the country where the lands were situate beech trees were reckoned timber trees. A judge at chambers having allowed, amongst others, in addition to not guilty, a plea traversing the above allegation, the court declined to rescind his order. *Mathews v. Mathews*, 7 C. B. 1018.

5. *Evidence in reply—Discretion of judge.*—In an action of trespass for false imprisonment, the defendant justified first on the



ground that the plaintiff had stolen some chaff belonging to the defendant; and secondly, on the ground that the defendant had reasonable cause for suspecting the plaintiff of stealing his "chaff." The plaintiff gave some evidence of the honest possession of some "chaff," and some peculiarities in that chaff were spoken to similar to those in the chaff found in the plaintiff's drawer, and claimed by the defendant as his stolen property. No mention was made of linseed either in the pleadings or in the course of the plaintiff's case by cross-examination or otherwise. The defendant called witnesses, who proved that in the chaff lost by him, and also in that found in the plaintiff's drawer, linseed was found mixed. The plaintiff then proposed, and was allowed by the judge, to call her father, who was in court, to prove that he had bought linseed some months before the alleged felony, and mixed it with chaff and sent it to the plaintiff, and to produce the invoice which he had received for that linseed: Held, that it was in the discretion of the judge to allow such evidence to be given by way of reply, and that he had rightly exercised such discretion. *Semble*, the court will not lay down any general rule as to the admission of evidence in reply. *Wright v. Wilcox*, 19 Law J. (N. S.) C. B. 333.

6. *Judgment as in case of a nonsuit*.—Issue was joined on the 15th of April, 1849. There were issues in law and issues in fact. Judgment was given on the issues in law at the sittings after Hilary Term, 1850. No step was taken by the plaintiff to bring the case to trial. In Trinity Term, 1850, the defendant moved for judgment as in case of a nonsuit: Held, that the application was premature. *Chrisp v. Atwell*, 19 Law J. (N. S.) Q. B. 416.

7. *Judgment in case of nonsuit*.—Upon a motion for judgment as in case of a nonsuit for not proceeding to trial after notice, the affidavit need not allege that due notice of trial has been given. It is no objection to a rule for judgment as in case of a nonsuit, founded on an omission to proceed to trial pursuant to a notice, that such notice was given at an earlier period than for anything shown by the defendant it need have been given. *Butler v. Frost*, 7 C. B. 969.

8. *Nul tiel record*.—When the plaintiff has to produce the record in court, after issue joined on a plea of nul tiel record, it is sufficient if he gives the defendant two days' notice of his intention to produce it. *Hopkin v. Doggett*, 19 Law J. (N. S.) Q. B. 417.

9. *Plea puis darrein continuance—Costs of motion*.—A defendant, who after issue joined obtained his discharge under the Insolvent Debtors Acts, 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, was allowed to plead such discharge puis darrein continuance, without an affidavit (under Reg. Gen. Hilary Term, 4 Will. 4) that the matter of the plea arose within eight days next before the pleading thereof, it being shown that the omission to plead within the prescribed time had not arisen from any culpable conduct on his part, and had occasioned no disadvantage to the plaintiff, but (Maule, J., dissentiente) the court allowed the plaintiff the costs of opposing the rule for that purpose. *Dunn v. Loftus*, 8 C. B. 76.

10. *Promissory note*.—The payee of a promissory note, having paid the amount to the indorsees, on default of the maker, sued the latter in the names of the indorsees, but without any authority from them, and obtained a verdict. The defendant having paid the debt, the court, upon his application, stayed the proceedings, without costs on either side, and each party bearing his own costs of the rule. *Coleman v. Biedman*, 7 C. B. 871.

11. *Rule nisi for new trial*.—Where a rule nisi had been obtained for a new trial, or to enter a verdict for the defendant, unless the plaintiff consent to reduce the verdict, and the plaintiff consents to reduce the verdict, and the rule is thereupon discharged, each party pays his own costs of the rule. *Thompson v. Bailey*, 4 Exch. 86.

12. *Suggestion under 9 & 10 Vict. c. 95*.—The verdict having been obtained on the 30th of May judgment was signed on the 6th of June. A rule for a suggestion was obtained on the 5th, and served on the plaintiff on the 7th of June (all in Trinity Term): Held, that the rule was not obtained too late, and it was made absolute, terms being imposed for the delay in serving it. *M'Gill v. Milton*, 19 Law J. (N. S.) C. B. 323.

13. *Traverse*.—To a declaration, the first count being on a promissory note, and the other counts being common counts, the defendant, without a rule to plead several matters, pleaded to the first count a traverse of the making of the note in that count, "and for a further plea, as to the whole declaration," non assumpsit: Held, that the plaintiff was entitled to sign judgment. *Harvey v. Hamilton*, 4 Exch. 43.

And see AFFIDAVIT.

PRINCIPAL AND AGENT.—1. *Directors binding company by cheque—Fraud*—8 & 9 Vict. c. 16, s. 97.—Three directors of a railway company, subject to the provisions of a special act and of the 8 & 9 Vict. c. 16, signed a document intended to operate as an order on the company's bankers for payment to a third party of the company's money, in fraud of the company, and for a purpose in violation of the special act. The document was signed by them in their own names, and countersigned by the secretary of the company, with the word "secretary" added to his signature. The three directors did not appear on the face of the document to sign as directors or to be directors. On the document was a stamp containing the name of the company, impressed in a circular form round the date "13th August, 1847," which date was also at the head of the document. A similar stamp was impressed on all the documents of the company: Held, that the document did not purport to be the cheque of the company, and was not binding on them. *Serrell v. Derbyshire, Staffordshire and Worcestershire Junction Railway Company*, 19 Law J. (N. S.) C. B. 371.

2. *Indemnity of agent—Compromise of action by agent*.—Where A. had instructed B. to order certain goods for him from C., and promised to indemnify him against the consequences of the order, and goods were supplied of a kind not required by A., but without

negligence on B.'s part, and were refused by A., but not returned at once to C.; C. having brought an action against B. for the price, under circumstances in which C. ought not to have recovered against B., and the fact of such action having been brought to A.'s knowledge and not defended by him: Held, by Wilde, C. J., and Maule, J. (dissentiente Cresswell, J.), that these circumstances gave B. an implied authority to compromise the action, exercising the best judgment he could, and that having so compromised the action he was entitled to sue A. for money paid to his use: Held, by Cresswell, J., that C. having no right of action against B., B. was bound to defend the action, and that an authority to compromise an action which might reasonably have been defended could not be implied. Talfourd, J., thought there was evidence of an express or implied authority to compromise the action from the above circumstances, coupled with the fact that the defendant shortly before the compromise conferred with the plaintiff and his attorney about the action. *Pettman v. Keble*, 19 Law J. (N. S.) C. B. 325.

3. *Payment to clerk of agent under false statement.*—The plaintiff had placed goods in the warehouse of E. & Co., at Huddersfield, for sale, and while they were there he sold two parcels to the defendant, who resided in London. After the defendant had paid the plaintiff for one parcel he received a letter from T., clerk to E. & Co., inclosing an invoice of the other parcel, and requesting payment, and stating that E. & Co. were authorized to receive the money for the plaintiff. The letter purported to be signed by E. & Co. per procuration of the plaintiff. The defendant remitted the amount as requested, but T. intercepted the letter at the office of E. & Co. and appropriated the money. T. only had authority from the plaintiff to receive payments over the counter for the goods deposited: Held, that the receipt by T. was no payment to the plaintiff. *Kaye v. Brett*, 19 Law J. (N. S.) Exch. 346.

**PRISONER SUING IN PERSON.**—A prisoner who conducts in person an action in which he is plaintiff is not entitled to a habeas corpus to bring him up to the judge's chambers to oppose a summons for leave to plead several matters, unless the judge in his discretion think that there is an urgent necessity for his presence. *Ford v. Graham*, 1 Q. B. P. 604.

**PROHIBITION.**—*Petty Bag Office—Jurisdiction of County Court—Discharge by Insolvent Court.*—A judge of a County Court having ordered the defendant in a plaint before him to pay the amount recovered or to be committed to prison, notwithstanding the defendant, after the judgment and before the last-mentioned order, had obtained his discharge from the Insolvent Court, and had inserted the debt in his schedule. The defendant by an ex parte application obtained a writ of prohibition out of the Petty Bag Office of the Court of Chancery to prohibit the County Court from executing the judgment. This court, on motion, set aside the writ; first, because no ground for prohibition was stated therein; and secondly, because

there was no excess of jurisdiction, since the order of the Insolvent Court did not take away the jurisdiction of the County Court, though it might entitle the defendant to be relieved from payment of the debt. *Still v. Booth*, 19 Law J. (N. S.) Q. B. 521.

And see ECCLESIASTICAL LAW.

**PUBLIC OFFICERS.**—*Notice to treat*—*Battersea Park Act*—9 & 10 Vict. c. 38.—Commissioners appointed under a public act to do on behalf of the executive government certain things for the benefit of the public, are not liable in the same manner as a private company is held to be in consideration of the statute granted to them. Where, under the powers of an act for forming a royal park, (9 & 10 Vict. c. 38,) the Commissioners of Woods and Forests had given notice to a landowner that they required his land for the purposes of the act, and he had in consequence sent in his claim for compensation, to which the commissioners did not agree, and he accordingly required to have a jury summoned to assess the amount, which they refused to do, the return to a mandamus, commanding the commissioners to summon a jury, stated that they acted only on behalf of her majesty under the provisions of the act, that they had expended or appropriated the whole of the funds which they had been able to raise, and that they had no means of raising any further sums at present; and that they gave notice to the claimant and others only for the purpose of ascertaining what sums would be required to purchase the lands for the purposes of the act and to determine whether its objects could be effected, and that it seemed probable that the sum which they were authorized to expend would be exceeded: Held, that under these circumstances the notice to treat did not operate as a contract by the commissioners, and that the mandamus could not be supported. *Reg. v. The Commissioners of her Majesty's Woods, Forests, &c.*, 19 Law J. (N. S.) Q. B. 497.

**RAILWAY ACT.**—*Consecrated land*—*Application to secular uses*—*Pleading*—*Evidence*—*Damages*.—A declaration in case stated that by their act of parliament the L. and B. Railway Company were not to interfere with a certain church or with the yard attached thereto without the consent of the Bishop of C., and payment by the company to the defendants of a sum to be agreed upon between the defendants and the company, in ascertaining which regard should be had to the cost of a site for a new church, and to the value of the said yard. That on payment by the company to the defendants of the sum so to be agreed upon, the said churchyard should vest in the company, and the sum so paid should be employed by the defendants in purchasing a new site and paying the plaintiff for the value of the said yard. It then averred that the sum agreed was 7732*l.* 17*s.* and that it was paid by the company to the defendants, and thereupon the church and yard vested in the company, whereupon the Bishop of C. gave his consent; that the said sum was sufficient to purchase a new site, and also to pay the plaintiff the value of the said yard, 2000*l.* of which the defendants had notice, and were

requested to pay. Breach, non-payment of the value. The defendants before action offered the plaintiff a sum which they had determined to be the value of the yard which was consecrated ground, and as such its value to the plaintiff was less than it would be to the company when applied to secular uses. The judge directed the jury, that the act did not make the determination of the defendants conclusive on the plaintiff, and that in estimating their damages they were at liberty to value the ground as applicable to secular uses: Held, no misdirection: Held, also, in arrest of judgment, that the declaration well disclosed the duty of the defendants under the act, and stated a good breach. *Hilcoat v. Archbishops of Canterbury and York*, 19 Law J. (N. S.) C. B. 376.

**RAILWAY.—1. Calls, action for—Shareholder—8 Vict. c. 16—Registration contract—Illegality.**—By an agreement dated July, 1847, A., for the considerations thereafter mentioned, agreed with an incorporated railway company to take certain shares and to pay 4*l.* per share in respect thereof on or before the 15th of August, 1847, and that so soon as 15*l.* per share should have been paid on the said shares, and the said company were in a position legally to do so, they should deliver to A. mortgage debentures of the railway company, bearing interest, for the sum of 24,675*l.*, being at the rate of 5*l.* per share. This agreement was duly confirmed by the company, and A.'s name was in consequence of it, and without any other authority, entered in the register of shareholders, and he had notice of such entry and register on such authority, and confirmed and ratified the same and assented thereto. A. was elected and acted as a director of the company after the making the agreement, and his name remained on the register, as the person entitled to these shares, until a call was in December, 1847, duly made upon them, of which he had due notice. In an action against A. to recover the call, the register of shareholders, duly authenticated, and containing an entry of A.'s name as a shareholder, was produced at the trial. On a special verdict finding these facts, it was held, that A. was liable as a registered shareholder to the call; that assuming the stipulation as to the delivery of the mortgage debentures to be illegal, it would be no defence to an action brought, not upon an executory contract, but on the statutable liability to pay calls. But that the stipulation being merely that the company would deliver the mortgage debentures when they were in a position legally to do so, was not illegal, and would not vitiate the contract on the part of A.: Held, also, that an action for the call made in December, 1847, might be maintained without proof that A. had paid the 4*l.* per share. *West Cornwall Railway Company v. Mowatt*, 19 Law J. (N. S.) Q. B. 478.

**2. English and Scotch company—Service of writ.**—The Caledonian Railway is situated in Scotland with the exception of six miles, which lie in Cumberland. The railway company's act incorporates so much of the 8 Vict. cc. 16 and 17 (the English and Scotch Companies Clauses Acts) as may be necessary for carrying into effect the object and purposes of the act in relation to the English portion

of the railway. The plaintiff having a claim against the company in respect of the amalgamation of a Scotch company with the Caledonian Railway, served a writ of summons upon the secretary of the company in London: Held, that the company filled the double character of a Scotch and English railway company, and that the service was regular. *Wilson v. Caledonian Railway Company*, 20 Law J. (N. S.) Exch. 6.

3. *Lands Clauses Consolidation Act—Compulsory powers of purchasing land—Limitation—Warrant to summon jury.*—The Lands Clauses Consolidation Act (8 Vict. c. 18, s. 123) provides, that “the powers of the promoters of the undertaking for the compulsory purchase or taking of lands for the purpose of the special act shall not be exercised after the expiration of the prescribed period.” Where within the prescribed period the promoters of a railway company gave notice to a landowner that they required to purchase his land, and the landowner gave notice to the company of the amount of his claim, and demanded that the amount of compensation should be settled by a jury; but the company neglected to take any further steps towards completing the purchase until after the expiration of the prescribed period, at which the claimant applied for a mandamus to compel the company to issue their warrant: Held, that the mandamus might issue, as the limitation in the statute does not apply where the proceedings for completing the purchase originates with the landowner under such circumstances. *Quære*, as to the effect of the 11 & 12 Vict. c. 3, upon the 8 Vict. c. 18, s. 123, in respect of the powers of compulsory purchase or taking of land. *Reg. v. Birmingham and Oxford Junction Railway Company*, 19 Law J. (N. S.) Q. B. 453.

RAILWAY COMPANY. See ACTION. EVIDENCE. TRESPASS.

RIGHT OF WAY.—Where on the trial of an indictment for driving a carriage along and thereby obstructing a public footway through a narrow lane, the question was whether the defendant’s private right of carriage-way preceding the public user, and inconsistent therewith, had been released or abandoned, and the jury were directed that no interruption by the public for a less period than twenty years could destroy the private right, a new trial for misdirection was granted, after verdict for the defendant. In such a case (no actual interruption for twenty years being proved) it is not so much the duration of the cesser to use the private easement, as the nature of the act done by the grantee of such easement, or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, that is material for the consideration of the jury. *Reg. v. Chorley*, 12 Q. B. 515.

RULE TO COMPUTE.—*Service of.*—Service of a rule to compute principal and interest, in an action on a bill of exchange, on a clerk at the defendant’s warehouse is insufficient. *Medlicott v. Williams*, 1 Q. B. P. 709.

SCIRE FACIAS.—*Repeal of letters-patent—Plea in abate-*



*ment.*—To a declaration in scire facias to repeal letters-patent, on the ground that the defendants (two in number) were not the first and true inventors, and that the invention was not new, nor an improvement, one of the defendants, B., pleaded that before the suing out of the scire facias the other defendant, S., assigned to him all his share in the letters-patent, and the privilege thereby granted, and had not since had any interest whatever in the said letters-patent; that the said defendant, S., could not be compelled to plead or demur to the said writ and declaration, and therefore the defendant, B., prayed judgment whether he ought to be compelled to plead or demur to the said declaration: Held, upon demurrer, that both the defendants had been properly made defendants, the letters-patent having been granted to them jointly. Held, also, that the joinder of too many defendants could not be made the subject of a plea in abatement, and therefore that the plea was bad. *Reg. v. Betts and Stocker*, 19 Law J. (N. S.) Q. B. 531.

SCIRE FACIAS. See PATENT.

SEQUESTRATION.—*Cause of action passing to assignees—*1 & 2 Vict. c. 110, s. 55.—Case by an insolvent beneficed clergyman against an attorney. The first count charged the defendant with negligence in defending an action brought against the plaintiff by one L., in consequence whereof judgment was given against the plaintiff for 14,500*l.*, and he was brought up on a writ of habeas corpus before the court, and remanded to the Queen's Prison, charged in execution for that amount, and was put to expense in endeavouring to reverse the judgment: Held (on general demurrer to a plea), that the cause of action did not pass to the plaintiff's assignees. The second count charged the defendant with negligence in setting aside a writ of sequestrari facias issued against the plaintiff's benefice, by reason whereof the writ remained in force longer than it otherwise would have done, whereby the plaintiff lost the rents, &c.: Held (on general demurrer to a plea), that the cause of action did pass to the plaintiff's assignees. *Wetherell v. Julius*, 19 Law J. (N. S.) C. B. 367.

SETTING ASIDE PROCEEDINGS.—*Death of defendant's attorney after notice of trial—Notice of taxation left at deceased attorney's office.*—After notice of trial given to the defendant's attorney for the first sittings in Michaelmas Term, the defendant's attorney, on the 9th of October, died. The cause was tried, pursuant to the notice, on the 3rd of November, and a verdict found for the plaintiff, and notice of taxation of costs was left by the plaintiff at the office of the defendant's deceased attorney on the 8th of November, the plaintiff's attorney not being aware of the death. On the 9th of November the plaintiff signed judgment for the debt and costs. In March, 1850, the defendant being in prison, the plaintiff lodged a detainer against him. The defendant having obtained a rule nisi to set aside all the proceedings in the action since the 9th of October, deposing that he did not know of any notice of trial having been given, and believed that none had been given, and that he had had no notice of any pro-

ceedings subsequent to the plea until he found that the detainer had been lodged, but not stating when he first knew that his attorney was dead,—the court discharged the rule. *Ashley v. Brown*, 19 Law J. (N. S.) Q. B. 477.

SET-OFF. See COUNTY COURT.

SHERIFF.—1. *Action for false return, &c.—Fraudulent judgment.*—To a writ of fieri facias, at the suit of the plaintiff, against the goods and chattels of J. W., the sheriff returned that, before the same was delivered to him, another writ of fieri facias against the goods and chattels of the said J. W., at the suit of another plaintiff, was delivered to him, and that, by virtue of the writ first delivered, he had caused to be seized and taken in execution the goods and chattels of the said J. W., which goods and chattels remained in his hands; and that the said J. W. had no more goods and chattels in his bailiwick, whereof he could cause to be levied the damages in the writ at the suit of the plaintiff: Held, in an action against the sheriff for a false return, and for not seizing, as he might have done, the goods of J. W. under the plaintiff's writ, that the sheriff was not estopped, by his return, from proving, as he did at the trial, that the goods seized under the first writ were the goods, not of J. W., but of a third person, it appearing that the judgment upon which such first writ issued was fraudulent and void. *Quære*, whether, because of the prior judgment being fraudulent and void, a seizure of J. W.'s goods under the plaintiff's writ must, in point of law, have been considered as made by the sheriff. The decision in *Imray v. Magnay* questioned. *Remmett v. Lawrence*, 20 Law J. (N. S.) Q. B. 25.

2. *Escape—Attachment.*—The court, in considering the terms of setting aside an attachment against the sheriff for the escape of an execution debtor, will be guided by the principle adopted by the legislature in the act 5 & 6 Vict. c. 98, s. 31, in the case of actions against the sheriff. Where the court had not sufficient materials for deciding upon affidavit what was the damage sustained by the plaintiff, an action was directed, in which the only question was to be the amount of damage sustained by the plaintiff in the former action by reason of the escape. *Reg. v. Sheriff of Leicestershire*, 19 Law J. (N. S.) C. B. 320.

SHIP AND SHIPPING.—*General average — Repairs — Perils of sea.*—No claim for general average arises when the master of a ship has been obliged to sell part of the cargo for the purpose of executing repairs made necessary by ordinary perils of the sea. The claim for general average arises when part of the cargo is sacrificed in order to preserve the rest from impending peril. The declaration, in an action brought by the shippers of goods against the shipowners, stated that the ship, proceeding on her voyage, was damaged by tempestuous weather, and put back to the port of lading to repair; that the master, not being able to obtain money for the repairs, sold part of the cargo, and that the defendants, in consideration of the premises, promised the plaintiffs to pay them the value at the port of discharge of the part of the cargo so sold. The defendants pleaded pleas to the

effect that the vessel was compelled by weather to put back to repair; that expenses were incurred in unloading and repairing; that they exceeded the value of the vessel; that they were necessary for the preservation of the ship and cargo, and for the completion of the voyage, and were done for the common benefit of all concerned; that the master having no funds, nor the means of raising any by bottomry or hypothecation, and no power of conveying the cargo to the port of discharge unless the repairs were completed, sold part of the cargo to defray such expenses; and that, by the custom of merchants, such loss was the subject of a general average contribution among all parties interested in the ship and cargo. On demurrer: Held, that the pleas were bad and the declaration good. *Hallett v. Wigram*, 19 Law J. (N. S.) C. B. 281.

And see WARRANTY.

**SPLITTING VOTES.**—7 & 8 Will. 3, c. 25, and 10 Anne, c. 23 — *Effect of conveyances under.*—In an action on a covenant for the payment of an annuity, the defendant, the grantor, is estopped from pleading that the annuity was granted for the fraudulent purposes of multiplying votes. The statutes of 7 & 8 Will. 3, c. 25, and 10 Anne, c. 23, are to be construed only as affecting the parliamentary law; the 7 & 8 Will. 3, c. 25, invalidated fraudulent conveyances entered into for splitting votes only so far as to prevent the grantee from having a vote, and did not prevent the estate from passing; and the 10 Anne, c. 23, assuming that an estate passed under conveyances, avoided by the statute 7 & 8 Will. 3, c. 25, so far as the right to vote was concerned, made such conveyances free and absolute, notwithstanding secret trusts and conditions of defeazance only preventing the grantor from voting under a penalty. *Phillpotts v. Phillpotts*, 20 Law J. (N. S.) C. B. 11.

**STAMP.**—1. *Agreement — Complete contract — Admission.* — A declaration alleged in substance that the defendant obtained S. D. as a partner for the plaintiff in his business upon the terms, amongst others stated in the declaration, that the plaintiff afterwards paid to the defendant 25*l.* for obtaining the said partner; and it was then agreed between the plaintiff and the defendant that the plaintiff should accept and deliver to the defendant a bill of exchange for 27*l.* 10*s.*, payable in eighteen months, upon condition that S. D. should accept the partnership beyond two years, but if S. D., at the expiration of eighteen months, should give notice of his wish to retire from the partnership, and not rescind it, the said bill should be null and void; that in consideration of the plaintiff's delivering the said bill, accepted, to the defendant, upon the said condition, the defendant promised, if he should negotiate it, and the said notice were given and not rescinded, to indemnify the plaintiff from the payment of the said bill and all costs, &c.; that the defendant afterwards negotiated the bill; that the plaintiff had been compelled to pay the amount; that S. D. gave notice at the end of eighteen months of his wish to retire from the partnership, and did not rescind

the same. Breach, that the defendant had not indemnified the plaintiff from the payment of the said bill. The defendant pleaded non assumpsit and a traverse of the condition upon which the bill was given, and at the trial the following unstamped document, signed by the defendant, was admitted as part of the evidence on behalf of the plaintiff:—"Mem. I have this day received of Mr. Fenwick de Porquet a bill for 27*l.* 10*s.* at eighteen month's date, on condition that Mr. Samuel Douglas accepts the partnership beyond two years; but should Mr. Douglas give notice at the end of eighteen months (the bill to be null and void) and not afterwards rescind the same:" Held, that the document had been properly received in evidence without an agreement stamp. *De Porquet v. Page*, 20 Law J. (N. S.) Q. B. 28.

2. *Agreement—Evidence—Costs, suggestion to deprive.*—In an action for wages for the salary of an actor, three letters were put in from the defendant to the plaintiff. The first was dated the 17th of November, 1848: "If you are disposed to take a weekly salary of 2*l.* and a clear half annual benefit, I think I could receive you at Christmas, provided the terms suit you (and a month's notice on either side in case of separation). Let me have your reply." The second, dated the 14th of April, 1849, stated that the defendant was obliged to offer lower terms for the summer season, and offered 1*l.* 10*s.* per week, and gave notice that if this offer was not accepted the plaintiff's services would not be required after the 26th of May. No answer from the plaintiff was put in evidence. The third letter, dated the 21st of April, ran as follows: "I have received your letter, and on reconsideration will give you the same terms," 2*l.* per week for the summer season: Held, on motion to enter a nonsuit according to leave reserved, that these letters were properly admitted without a stamp, as amounting only to a proposal, and not constituting an agreement in writing. Where an action is brought for more than 20*l.*, and a plea in abatement is pleaded as to part, which is found in favour of the defendant, and the plaintiff gives credit in his particulars for a sum, which, together with the sum to which the plea in abatement applies, reduces the claim to less than 20*l.*: this is a case for a suggestion to deprive the plaintiff of costs within section 129 of the 9 & 10 Vict. c. 95. *Hudspeth v. Yarnold*, 19 Law J. (N. S.) C. B. 321.

3. *Memorandum of debt discharged—Debt for goods sold—Plea of payment.*—Under a plea of payment to an action for goods sold and delivered, a document in the following form is not admissible in evidence without a stamp: "Memorandum, that any demand we may have against Mr. George Whiting for ironwork, &c., is this day discharged in consideration of services rendered by him to us. N.B. Particulars of our account shall be delivered with stamp receipt." *Livingston v. Whiting*, 19 L. J. (N. S.) Q. B. 528.

STAMP DUTY.—A policy of insurance on the lives of cattle is an insurance on lives within the 55 Geo. 3, c. 184, and is liable to duty; but such an instrument is liable to a 5*l.* penalty for want of a

stamp, under the 10 Anne, c. 26, and not to the penalty of 500*l.* under 35 Geo. 3, c. 63, s. 17, which applies to marine insurances only. *Att.-Gen. v. Cleobury*, 4 Exch. 65.

**STATUTE OF FRAUDS.—Surrender—Evidence.**—Defendant was tenant to A. B. of certain apartments, under a written agreement for a term of years, at a rent payable quarterly; A. B. became bankrupt. Defendant having occupied for a short time after the bankruptcy and after appointment of the assignees, sent the key to the office of one of the plaintiffs, the official assignee, by a person who left it there with one whom he supposed to be the clerk, stating that it was the key of the apartments in question, and that he had brought it from the defendant; a tin plate was fixed outside the door announcing that the defendant had removed to another address. The plaintiffs having eighteen months afterwards demanded six quarters' rent due since the bankruptcy: Held, that there was no evidence from which a jury could properly find that there had been a surrender by operation of law, assuming that the delivery by the defendant and acceptance by the official assignee of the key of the apartments would have amounted to such surrender within the Statute of Frauds. *Cannon v. Hartley*, 19 L. J. (N. S.) C. B. 323.

**SUGGESTION UNDER COUNTY COURTS ACT.—Statement of residence.**—On a motion for a suggestion to deprive a plaintiff of costs under the County Courts Act, an affidavit which stated that the plaintiff dwelt within twenty miles from the defendant, instead of from the residence of the defendant, was held to be bad. *Room v. Cottam*, 20 L. J. (N. S.) Exch. 24.

**SUGGESTION.** See COUNTY COURT. PRACTICE.

**SUMMONS ABROAD.—Service of.**—Service of a writ of summons abroad is an irregularity only, and not a nullity. Where, therefore, a defendant resident at Boulogne was served there with a writ of summons on the 13th of September, an appearance was entered for him on the 24th of October, and the declaration was served by leave of a judge, by sending it on the 25th through the post: Held, that an application made on the 14th of November to set aside the writ and other proceedings was too late, even though the subsequent proceedings were taken under affidavits which suppressed the fact that service had been effected abroad. *Minet v. Round*, 1 Q. B. P. 654.

**SURRENDER.** See STATUTE OF FRAUDS.

**TOLLS.—Great Western Railway.**—The Great Western Railway Company are entitled to take the tolls authorized by the 5 & 6 Will. 4, c. cvii., 6 & 7 Will. 4, c. xxxviii., and 1 Vict. c. xcii., until they have completed the purchase of either the Birmingham and Oxford Junction Railway, or the Birmingham, Wolverhampton and Dudley Railway, but after such completion, the tolls, both on the original line and on such purchased line, must be reduced to the lower scale fixed

by the 10 & 11 Vict. c. cxlix. and 10 & 11 Vict. c. ccxxvi.—*Att.-Gen. v. Great Western Railway Company*, 19 L. J. (N. S.) Exch. 407.

TORT. See MISJOINDER.

TRESPASS.—1. *Injury done by an engine propelled at a certain rate.*—The plaintiff's sheep got upon the defendants' railway, through defect of fences, and were run over by a locomotive engine driven by a servant, who had directions from the railway company to drive at a certain rate per hour: Held, that trespass would not lie against the company, and that, if the cattle had a right to be on the railway, the plaintiff's remedy was by action on the case for causing the engine to be driven in such a way as to injure that right. If the cattle were altogether wrongdoers, there was no neglect or misconduct for which the company were responsible. If the cattle escaped through defect of fences which the company should have kept up, their damage was consequent on that wrong, and irrecoverable in an action on the case against the company for letting their fences be incomplete or out of repair. *Sharrod v. London and North-Western Railway Company*, 4 Exch. 580.

2. *Way in gross—Easements—Right of assignee of land and appurtenances.*—In an action of trespass the defendants justified under a right of way supposed to have been conveyed to them by J. S. The deed was set out on oyer by the plaintiff, and in the description of the parcels conveyed contained the following: Together with all ways, &c., particularly the right and privilege to and for the owners and occupiers of, &c. (the premises conveyed), and all persons having occasion to resort thereto, of passing and repassing for all purposes in, over, along and through a certain road, &c. (describing the locus in quo). The defendants in their plea, after stating the conveyance to J. S. in the terms of the deed, and deducing their title from J. S. under a conveyance to them of the same "lands, tenements, hereditaments, premises and appurtenances," as those conveyed to him by the above-mentioned deed, alleged that they being owners and occupiers of the premises, and having occasion for their own purposes to use the right and privilege granted by the conveyance to J. S., did on foot, &c., pass and repass for the purposes of them, the defendants, along the said road, &c. (the locus in quo): Held, first, that the right granted by the conveyance to J. S. was not restricted to a user of the road for purposes connected with the enjoyment of the land conveyed to him by the same deed; secondly, that the conveyance to the defendants of the land conveyed to J. S., and its appurtenances, could not give the defendants, as owners and occupiers of that land, a right of road over other land for purposes unconnected with the enjoyment of the land of which they were owners and occupiers, and therefore did not pass to them the rights which J. S. had over the locus in quo. A vendor cannot create rights not connected with the enjoyment of the land and annex them to it, nor can the owner of land render it subject to a new species of burden so as to bind it in the hands of an assignee. *Ackroyd v. Smith*, 19 Law J. (N. S.) C. B. 315.



**TROVER.**—*Sale in market overt—Stolen goods.*—Goods which have been stolen may be recovered in trover from the purchaser of them in market overt, upon a conversion by him, subsequent to the conviction of the felon, without any order for restitution having been made, for the effect of the 7 & 8 Geo. 4, c. 29, s. 57, is to revest the property in stolen goods in the original owner upon conviction of the felon. *Scattergood v. Sylvester*, 19 Law J. (N. S.) Q. B. 447.

**USURY.**—*Plea of.*—A plea of usury stated that it was “corruptly and against the form of the statute” agreed between plaintiff and defendant, that plaintiff should advance to defendant, as he should require, sums not exceeding 1000*l.* by cashing defendant’s cheques, and that plaintiff should charge at the rate of 10*l.* per cent. as interest, and under the colour of commission; it then averred that the money was advanced and the usurious interest was so charged: Held good on special demurrer, though it stated only the gross sum payable for interest and commission, without alleging how much was attributable to each, it being averred that the agreement was made colourable to enable the plaintiff to take more than 5*l.* per cent. In pleading usury it is sufficient to allege that it was “corruptly and against the form of the statute” agreed, so as to bring the case within 12 Anne, stat. 2, c. 16, and it is unnecessary to allege that it is not taken out of the operation of that act by 2 & 3 Vict. c. 37. *Derry v. Toll*, 1 Q. B. P. 589.

**VENUE.**—*Changing—Affidavit.*—One of two defendants may under ordinary circumstances change the venue without the consent of the other. A rule to discharge a rule for changing the venue need not be drawn up on reading the affidavits on which the original rule was obtained. *Job v. Butterfield*, 20 Law J. (N. S.) Exch. 8.

**VOTE.** See SPLITTING VOTE.

**WARRANT OF EXECUTION.**—A mere verbal gift of a chattel to a person in whose possession it is, does not pass any property to the donee. *Shower v. Pilk*, 4 Exch. 478.

**WARRANTY.**—*Sale of ship—Description.*—The defendant being the owner of a ship inserted the following advertisement in the Shipping Gazette: “The fine teak-built barque Intrepid, A 1, 286½ tons register, built under particular inspection at Counga in 1842 of the best materials, shifts without ballast, carries a good cargo, has a poop and excellent height between decks, and is well adapted for a passenger ship; length 91½ feet, breadth 22 feet 8 inches, depth 16 feet 8 inches; now lying at the St. Katharine Docks. For inventories and further particulars apply to J. H. Arnold, 3, Clement’s Lane, Lombard Street.” The plaintiff having seen the ship, entered into a written agreement to buy her as she now lays in the St. Katharine’s Docks, agreeable to the inventory annexed. This document commenced thus: “For sale by private contract the fine teak-built barque Intrepid, &c.” pursuing the terms of the advertisement down to the words St. Katharine’s Docks. Then followed this statement:

“Hull, masts, standing and running rigging, with all faults as they now lie.” Under this was the word “inventory,” which was followed by a list of the ship’s stores and tackle, and the document concluded with these words: “The vessel and her stores to be taken with all faults as they now lie, without any allowance for deficiency in length, height, quantity, quality, or any defect or error whatever. For inventories and further particulars apply to J. H. Arnold, 3, Clement’s Lane, Lombard Street, London.” The defendant signed his name to this inventory opposite to the list of the ship’s stores. The vessel proved not to be teak-built, nor of Class A 1, nor adapted for a passenger ship: Held, first, that the contract of sale incorporated the whole of the above document, and not merely the list of stores headed “Inventory.” Secondly, that the defendant was not guilty of a breach of warranty. *Taylor v. Bullen*, 20 Law J. (N.S.) Exch. 21.

**WEIGHTS AND MEASURES.**—5 & 6 Will. 4, c. 63—*Vessels used as measures liable to be seized.*—Vessels, whether of earthenware or other material, which are ordinarily used as measures, are liable to seizure, if they do not correspond with the imperial measures, pursuant to 5 & 6 Will. 4, c. 63, s. 21. *Washington v. Young*, 19 Law J. (N. S.) Exch. 348.

**WILL.**—*Publication by sealing—Attestation under power.*—If the attestation to a document executed under a power expresses in any form of words an act to have been done in the presence of witnesses, by which the complete execution of the instrument, as required by the power, appears to have been effected, it is sufficient; but where the terms of the power require two or more such acts to be done, then, if the attestation expresses only the doing of one of them, even though from it all persons would clearly infer that the other act had also taken place, the power is not well executed. Therefore, where an indenture gave to S. I. a power to appoint by her last will, “to be by her signed and published in the presence of and attested by two or more credible witnesses,” and S. I. made her will, and signed and sealed it in the presence of two witnesses, the attestation being in these terms, “Signed and sealed in the presence of H. P. of, &c., and M. E., &c. :” Held, that the power was well executed, as the sealing amounted to a publication. *Vincent v. Bishop of Sodor and Man*, 19 Law J. (N. S.) Exch. 366.

**WITNESSES ABROAD.**—1. *Commission to examine.*—Where a commission issues under stat. 1 Will. 4, c. 22, s. 4, for the examination of witnesses abroad, the place of examination must be specified in the rule or order authorizing the commission, or in some subsequent rule or order; and examinations taken under such commission are inadmissible in evidence, if the order be produced omitting to specify place, though the commission itself, under the seal of the court, contain all necessary particulars. *Greville v. Stulz*, 11 Q. B. 997.

2. *Examination—Order—Evidence of the return.*—A judge’s order in December, 1845, directed a commission to issue for the examination

of certain witnesses *vivâ voce* at Newfoundland, returnable on the last day of Trinity Term then next. The commission issued in pursuance of this order was addressed to certain commissioners, described as "of St. John's, in the island of Newfoundland," and commanded that at a certain day and place, or certain days and places, to be appointed by them, they should cause the witnesses to come before them at "Newfoundland, and then and there examine each of the said witnesses apart." The commission was sent by post to the said commissioners in the beginning of 1846. At the end of May, 1846, a sealed packet was left at the Master's office by a person not known: it contained the commission, the return to it, and the examinations of the witnesses, signed by the persons named as commissioners, who were proved to have been living at St. John's, Newfoundland, where the return purported to have been made seven years before the alleged return and three months after it. The return and examinations were produced in the same state as when left at the Master's office, and bore no mark of alteration: Held, that the order gave sufficient directions as to "the time, place and manner" of examination under sect. 4 of stat. 1 Will. 4, c. 22, and that the commission was warranted by the order; that there was sufficient proof of the return, without further evidence to show that the examinations were in the same state as when sent forth by the commissioners; and that it must be presumed that the witnesses were examined apart. *Simms v. Henderson*, 11 Q. B. 1015.

YEARLY TENANCY. See LEASE.

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## CRIMINAL AND MAGISTRATES' CASES.

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CONTAINED IN

20 Law J. (N. S.) M. C. part 1.

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**APPEAL.** See **LUNATIC PAUPER.**

**BOROUGH RATE.** See **REPLEVIN.**

**FALSE PRETENCES.**—*Larceny—Servant.*—It was the duty of the prisoner, who was a servant of the prosecutors, in the absence of their chief clerk, to purchase and pay for, on behalf of his masters, any kitchen stuff brought to their premises for sale. On one occasion he falsely stated to the chief clerk that he had paid 2s. 3d. for kitchen stuff which he had bought for his masters, and demanded to be paid for it. The clerk on this paid him 2s. 3d. out of money which his master had furnished him with to pay for the kitchen stuff. The prisoner applied the money to his own use: Held, that as the clerk had delivered the money to the prisoner with the intention of parting with it altogether, the prisoner was not liable to an indictment for stealing the money, but that he might have been indicted for obtaining it by false pretences. *Reg. v. Barnes*, 20 Law J. (N. S.) M. C. 34.

**INDICTMENT.**—*For disobeying order of sessions for maintenance of a bastard—Soldier—Mutiny Act—Criminal matter.*—If an order of justices be made, commanding a soldier in the Queen's service to pay a certain sum weekly for the maintenance of a bastard child, the soldier may be indicted for refusing to obey the order, and is not protected from punishment by section 52 of the Mutiny Act, 12 & 13 Vict. c. 10, as such disobedience is a criminal matter, and criminal matters are expressly excepted from the operation of that section. *Reg. v. Ferrall*, 20 Law J. (N. S.) M. C. 39.

And see **RECEIVING**, &c.

**JURISDICTION.** See **JUSTICE.**

**JUSTICE OF THE PEACE.**—11 & 12 Vict. c. 44, ss. 1, 2—*Excess of jurisdiction—Trespass, when maintainable.*—By the 11 & 12 Vict. c. 44, s. 1, it is enacted that every action against a justice for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction as such justice, shall be an action on the case, and in the declaration it shall be expressly

alleged that such act was done maliciously, and without reasonable and probable cause. Sect. 2 provides, that for any act done by a justice in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby, or by any act done under any conviction, &c., issued by such justice in any such matter, may maintain an action against such justice in the same form and in the same case as he might have done before the passing of the act: Held, that the two sections must be read together, and that sect. 2 applies only to those cases where the act in respect of which the action is brought against the justice is itself an excess of jurisdiction. Therefore, where a justice convicted the plaintiff in a penalty, and adjudged that it should be levied by distress and sale, but exceeded his jurisdiction in ordering the plaintiff in default of payment to be set in the stocks, which however was never done, but the penalty was levied by distress, it was held that an action of trespass for seizing the goods under the distress was not within sect. 2, and was not maintainable by reason of sect. 1. *Barton v. Bricknell*, 20 Law J. (N. S.) M. C. 1.

**LUNATIC.**—1 & 2 Vict. c. 14—*Adjudication of settlement—Jurisdiction—Appeal.*—By 1 & 2 Vict. c. 14, s. 2, where any person is apprehended under circumstances denoting a derangement of mind and a purpose of committing a crime, for which, if committed, he would be liable to be indicted, two justices of the county in which such person is apprehended, on proof that he is insane or a dangerous idiot, may by an order cause such person to be conveyed to the county lunatic asylum, “and it shall be lawful for the said justices to inquire into and ascertain, by the best legal evidence that can be procured under the circumstances, of personal legal disability of such insane person or dangerous idiot, the place of the last legal settlement of such person,” and to make an order on the overseers of the parish where they adjudge him to be settled for the cost of examining and conveying him to the asylum, and of his maintenance in the asylum; and where such place of settlement cannot be ascertained, such order shall be made upon the treasurer of the county, &c., where such person shall have been apprehended: Held, that the jurisdiction of the two justices to inquire into the settlement of the lunatic was not limited to the time of making the order by which he was conveyed to the asylum, but might be exercised at any subsequent time, and that no order could be made on the county for the expenses until they had inquired into, and failed to ascertain, the place of settlement. By sect. 3 of the same act, an appeal is given to the overseers, &c., of the parish in which the justices shall adjudge any such insane person to be settled, “and in like manner, and under like restrictions and regulations, as against any order of removal,” giving reasonable notice to the clerk of the peace of the county, &c., who is to be respondent in such appeal: Held, that these provisions come into operation only when an appeal has been commenced, and that therefore the keeper of the asylum was a proper person to serve the notice of chargeability and other documents required by the Poor Law Acts to be sent to the

overseers of the parish to be affected by the order of adjudication of settlement. *Reg. v. Clerk of the Peace of the West Riding of Yorkshire*, 20 Law J. (N. S.) M. C. 18.

PAUPER. See LUNATIC.

POOR RATE.—*Rateability and liability to*—4 Vict. c. xvi.—*Beneficial occupation*.—Under an act, 4 Vict. c. xvi., commissioners were appointed for the improvement of H. within certain limits, containing parts of several townships; and the property in all the public wells or springs of medicinal or mineral waters within the said limits was vested in the said commissioners, and they were empowered to add to or alter the existing erections over the said springs, and to erect a pump-room over the sulphur water springs; the act also gave them special powers with reference to the maintaining of footways, the obstructions, cleansing and lighting of the streets, the removal of dirt and rubbish from houses and premises, the preventing of nuisances, the providing a proper market; and further empowered them to make annual rates upon the owners of property within the limits of the act, the money arising therefrom, as also all other monies received under the act, to be applied entirely in paying off all monies borrowed on the rates, and defraying the expenses incurred in carrying out the purposes of the act. A pump-room was afterwards built, under the power for that purpose given by the act, which was open to and used by the public generally, subject only to a small payment to the commissioners and certain other regulations imposed by the act: Held, that the commissioners were properly rated, as occupiers and owners of such pump-room, to the relief of the poor of one of the townships in part within the limits of the act, the purposes for which they were appointed not being for the public advantage only. *Reg. v. Commissioners of High and Low Harrogate*, 20 Law J. (N. S.) M. C. 25.

PUBLIC IMPROVEMENTS. See POOR RATE, &c.

RATE. See REPLEVIN. POOR RATE.

RECEIVING STOLEN GOODS.—1. *Arrest of judgment*—*Indictment*.—An indictment in the first two counts charged the prisoner with larceny; in the third count it alleged that the prisoner, “the goods and chattels aforesaid, so as aforesaid feloniously stolen,” &c., feloniously did receive knowing them to have been stolen. The jury acquitted the prisoner on the first two counts, but found him guilty on the third. A motion was made to arrest the judgment, on the ground that the words in the third count, “so as aforesaid feloniously stolen,” imported a charge that the goods were stolen by the prisoner as alleged in the previous counts, and that as the jury had negatived the charge of stealing, the finding on the third count could not be supported: Held, that whether the words “so as aforesaid feloniously stolen” imported that the prisoner stole the goods or not, the conviction was perfectly good, as the finding of the jury on one count could not on a motion in arrest of judgment be used to impeach the finding



on another count however contradictory. *Reg. v. Craddock*, 20 Law J. (N. S.) M. C. 31.

2. *What amounts to a receipt—Manual and constructive possession.*—A., B. and C. were jointly indicted for stealing and receiving some fowls. It was proved that A., carrying a sack containing stolen fowls, went with B. at past four in the morning into the house of C.'s father; that in about ten minutes time A. (still carrying the sack) came out of the back door with B., preceded by C. with a lighted candle, that C. was the only member of the family up in the house, that the three went together into a stable on the same premises; that the police went into the stable after them, and found the sack lying on the floor, and the three men standing round it as if bargaining. The bench told the jury that the taking of A. and B. with the stolen goods by C. into the stable, over which he had the control, for the purpose of negotiating about the buying of them, he well knowing the goods to have been stolen, was a receiving them within the meaning of the statute. The jury convicted A. and B. of stealing the fowls, and C. of receiving the fowls knowing them to have been stolen. Upon a case stating the above facts, the question asked being whether the conviction of C. was proper, Held by a majority of judges (eight to four) that the conviction was wrong. The majority were of opinion that C. did not receive the fowls, as they all along remained in the manual possession of A. and B., and were never under C.'s control, and it was not the intention of A. and B. that C. should have them except on the contingency which never happened, of his completing a bargain for them. The minority held that as C. co-operated with A. and B. in the common purpose of carrying the fowls into the stable he had a joint possession with them, and that as he knew that the fowls were stolen, and assisted in removing them for the purpose of negotiating about the purchase, he had a possession with a wicked purpose, and therefore might properly be convicted as a receiver. *Reg. v. Wiley*, 20 Law J. (N. S.) M. C. 4.

REPLEVIN AGAINST MAGISTRATES ALONE.—*Borough rate—Validity of warrant—Jurisdiction—Time of sale under 27 Geo. 2, c. 20.*—The council of the borough of Lichfield, before making a borough rate, made an estimate pursuant to 5 & 6 Will. 4, c. 76, s. 92, in which was included an item of 105*l.* 14*s.* 10*d.*, in respect of three years arrears of salary awarded to a former town clerk as compensation for his discharge. The same party having also recovered against the town council 467*l.* for damages and costs, and, threatening execution against the corporation, received payment for that amount from the attorney for the council, who intended to charge it to the council as a disbursement, but had not delivered his bill of costs. In respect of the sum of 467*l.*, and the attorney's bill of costs, the sum of 800*l.* was introduced into the estimate. The council afterwards made a borough rate, including the above sums. At a meeting, which was not public, the borough council made an order which directed the overseers of certain parishes within the borough to pay the proportions assessed upon their parishes out of

the poor rates made and collected, and they also issued a warrant to their treasurer commanding him within 100 days from the date thereof to demand from the overseers the said proportions. The treasurer made his precept to the overseers, requiring them within 100 days after the receipt thereof to pay the proportions out of the poor rates made and collected, or to be made and collected. The plaintiff, an overseer, not having paid the proportions aforesaid on his parish, a warrant was issued by the defendants, being the mayor and justices of Lichfield, commencing thus, "Borough and City of Lichfield." The warrant then directed certain parties to levy the sum of 77*l.* 16*s.* 1½*d.* by distress of the plaintiff's goods, and provided that "if within the space of five days next after such distress by you taken the sum of 77*l.* 16*s.* 1½*d.* shall not be paid that then you do sell the said goods." "Given under our hand and seal, and under the corporate seal of the said borough city. T. T. (L. S.), M. B. M. (L. S.), justices of the said borough and city. (Corporation seal), Thomas Johnston, Mayor." The defendant Johnston was not stated in the body of the warrant to be mayor of the borough: Held, first, that a borough rate need not be made in public. Secondly, that as the rate was good upon the face of it, even although it might be retrospective, in fact (which, *semble*, it was not) no advantage could be taken of that circumstance as against the defendants. Thirdly, that the warrant was not bad by reason of its directing the sum to be paid out of the rates to be made and collected; nor, fourthly, in directing the overseers to pay the sum within 100 days after the receipt of the warrant. Fifthly, that it sufficiently appeared from the warrant that one of the defendants was mayor of the borough at the time of making the warrant. Sixthly, that the warrant of distress appeared to have been made within the jurisdiction of the mayor and justices. And, lastly, that the warrant was not bad under the 27 Geo. 2, c. 20, in not fixing the time at which the sale of the plaintiff's goods was to terminate. An action of replevin may be maintained against magistrates alone who issue a warrant of distress against the goods of a party. *Jones v. Johnson*, 20 Law J. (N. S.) M. C. 11.

SETTLEMENT OF PAUPER. See LUNATIC.

STATUTE 11 & 12 VICT. c. 44. See JUSTICE.

TRESPASS. See JUSTICE.

## E Q U I T Y.

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Comprising the Equity Cases contained in the following Reports :—

17 Simons, part 1.	7 Hare, part 4.
12 Beavan, part 1.	19 Law Journal (N.S.) parts 11 and 12.
2 De Gex & Smale, part 3.	20 Law Journal (N.S.) part 1.

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**ACTION.** See **COMPANY.**

**ADMINISTRATION OF ESTATE.**—*Creditor's suit*—*Staying proceedings*—*Costs.*—Where a decree for the general administration of an estate has been made, and the court upon that ground restrains the proceedings in another (a creditor's) suit, the question of payment of the costs of the plaintiff in such creditor's suit will be reserved if the debt be disputed by the executors. The case of *West v. Swinburne* explained. *Davey v. Pleston*, 19 Law J. (N.S.) Chanc. 491.

**ADMINISTRATION SUIT.**—*Trustees.*—Trustees who file a bill for administration of a testator's estate are entitled to their costs, however small the estate may be, and however small the risk in administering the estate. *Hodgkinson v. Gilbert*, 19 Law J. (N.S.) Chanc. 424.

**ANSWER.** — *Sufficiency* — *Exceptions*—*Pleading.* — If a defendant puts in an answer to an interrogatory which is acquiesced in by the plaintiff, and the bill is afterwards amended leaving the interrogatory and the corresponding statement unchanged, but varying an antecedent which alters the meaning of such statement, the plaintiff is not entitled to a new answer to such interrogatory unless he specially requires it; but a defendant who acquiesces in the new meaning of the statement by professing to answer it, must do so fully. An answer may be verbally full but technically insufficient, as where a defendant sets up his ignorance of facts as to which he has plainly the means of obtaining the information required. The answer of persons engaged in working a coal mine, which stated that they could not, as to their belief or otherwise, set forth the mode of working, Held, insufficient, the court assuming that they must have workmen under their control, from whom such information might be derived, and which the defendants were bound to afford. *Att.-Gen v. Rees*, 12 Beav. 50.

**BANKRUPTCY.**—*Affidavit of—Retiring pension of commissioner—Consent of creditors to suit—Costs, &c.*—The annuity awarded as compensation to a commissioner of bankruptcy, whose duties were abolished by the 5 & 6 Vict. c. 122, passes to his assignees on his insolvency. But if the insolvent will not make the affidavit (required by the order for payment of the annuity), that he does not hold any office of emolument, &c., neither the Lord Chancellor can dispense with it, and, *semble*, that in the existing state of the law the assignee is without any remedy in such a case. A bill by an assignee in insolvency need not allege that the consent of the creditors has been obtained to the institution of the suit. Under the 76th Order of May, 1845, the court has jurisdiction to order the costs of a motion by the plaintiff to take the bill pro confesso to be paid by the defendant, although the latter puts in his answer before the motion is made. The court can on a demurrer send a case for the opinion of a court of law. *Spooner v. Payne*, 2 De Gex & S. 439.

**BEQUEST.** See **WILL**.

**BUILDING SPECULATION.**—*Waiver and acquiescence.*—In May, 1843, A. and B. agreed by parol to become jointly interested in certain lands for the purpose of a building speculation. The lease of the land was taken in B.'s name, and A. and B. continued in joint occupation of the lands till July, 1843, when B. assumed exclusive possession and ejected A. From July, 1843, B. at his sole labour and expense carried on operations upon the land by preparing it for building purposes and erecting houses thereon, A. never asserting any title thereto until January, 1845, when he claimed an equal interest with B. Upon B. repudiating A.'s title, a bill was filed by A. for specific performance of the parol agreement: Held, that assuming A.'s title to have been good originally, he had debarred himself from asserting that title by making no claim for eighteen months after his exclusion, during all which time he had permitted B. to carry on the undertaking at his own cost and risk; and the bill was dismissed with costs, except so far as the same were increased by the defendant setting up the Statute of Frauds or denying the parol agreement or part performance thereof. *Cowell v. Watts*, *Watts v. Cowell*, 19 Law J. (N. S.) Chanc. 455.

**CHARITY.**—1. *Decree, construction of—"Future rents."*—A schoolmaster retained all the rents of a charity estate, after making small fixed payments to the alms-people. At the hearing, the court held that he was not entitled to do so, and made a decree referring it to the Master to inquire what the charity estate and property consisted of, and to settle a proper scheme for the management of the estates and property, and "for the application of the future rents and profits of the school." No account was directed against the schoolmaster: Held, that "future rents" meant all those subsequent to the decree,

and the schoolmaster having died before the scheme had been settled, the court, on a supplemental information, directed an account against his personal representatives of the rents received subsequent to the decree. *Att.-Gen. v. Tufnell*, 12 Beav. 35.

2. *Lease for 999 years—Allowance for building.*—Lease of charity land for 999 years, subject to a fixed rent of 10*l.* and a covenant to lay out 300*l.* in building, set aside after 150 years, and an allowance for the building refused. An alienation of charity property may be valid, but the onus of proof lies on the alienee. *Att.-Gen. v. Pilgrim*, 12 Beav. 57.

3. *Management of—Ordinances avoided—Leases on fines.*—Ordinances, made by A., B. and C. under a power contained in a royal charter, for the management of charity property, followed by an act of parliament, confirming all ordinances made or to be made by A., B. and C., held, under the circumstances, to be unauthorized and not confirmed, and the same after a great lapse of time set aside. A charity was established in the reign of Hen. 8 for two chaplains and twelve poor. In 1572 Queen Elizabeth by letters-patent ordained, that the chaplains and poor “in omnibus et per omnia se gerent exhibebunt commiserabuntur et eligentur juxta ordinaciones, regulas et statutas in hac parte,” to be made by A., B. and C. In 1574, A., B. and C. accordingly made regulations giving to the master the whole management of the charity property, and authorizing him to let on fines and appropriate the fines to his own use. In 1576 an act of parliament confirmed the charter of 1572 and the ordinances made or to be made by A., B. and C. By letting on fines, the property, which was worth 7000*l.* a year, produced on an average only 1200*l.*, nearly half of which consisted of fines, and was received by the master. The court held, that this ordinance was not authorized by the charter or confirmed by the act of parliament; and that even if it were, still that this proceeding being shown in the lapse of time to be prejudicial to the objects of the charity, the court would direct a new mode of management to be adopted. *Att.-Gen. v. Wyggeston Hospital*, 12 Beav. 113.

COAL MINES.—*Inspection of—Practice.*—Order made on motion for an inspection of coal mines. *Att.-Gen. v. Chambers*, 12 Beav. 159.

COMPANY.—1. *Chancery, jurisdiction of—Order under the Winding-up Acts.*—Several persons proposed to establish a company for making a foreign railway, and large sums of money were raised by the sale of scrip, but the scheme failed. An order was made under the 11 & 12 Vict. c. 45, and the 12 & 13 Vict. c. 108, to wind up the affairs of the company. A subscriber afterwards filed a bill for the same purpose, and also to obtain relief against the provisional directors for various improper acts with which he charged them: Held, though there was a doubt that the case came within the acts of parliament, that the jurisdiction of the Court of Chancery was not interfered with, that the proceedings under the acts of parliament

ought to be continued, and that the proceedings by bill ought to be stayed. *Parbury v. Chadwick*, 19 Law J. (N. S.) Chanc. 562.

2. *Practice—Winding-up Act—Reference to the Master—Petition—Report.*—Under the Joint-Stock Companies Winding-up Act a report of the Master, upon a reference to inquire whether a company ought to be wound up, ought to be confirmed on an application to the court by way of petition and not by motion. *Imperial Salt and Alkali Company*, 19 Law J. (N. S.) Chanc. 393.

3. *Scrip holder—Trustee—Costs.*—The allottee of scrip in a provisionally registered public joint-stock company sold the scrip certificates in the market, and after the company obtained its act of parliament, and in default of the scrip holder claiming to be registered within the time required by the company, was registered as the owner and received sealed certificates of the shares. He subsequently paid calls, and sold the shares in the market: Held, that the allottee was trustee of the shares standing in his name for the purchaser of the scrip certificates. The plaintiff (the purchaser of the scrip) discovering from the answer of the defendant (the allottee) that the amount received for the shares was only 9*l.*, and having previously grounds for supposing a larger amount might be recovered, offered to abandon the suit upon payment of the 9*l.* and his costs. The defendant refused, and the court decreed payment to the plaintiff of the 9*l.* and costs of the suit. *Beckitt v. Billborough*, 19 Law J. (N. S.) Chanc. 522.

4. *Winding-up Acts—Claim by the secretary for salary.*—When the above company was formed, it was resolved that no director of the company should be personally responsible for the salaries of the officers, and that no officer should obtain payment for his services until a sufficient sum should have been obtained by the funds of the company for that purpose. It was also agreed that the officers should receive half their salaries until such time as it might be convenient to the company to pay the whole. Upon the company being wound up, the Master disallowed the claim of the secretary for salary during the two years he had acted as such and one year afterwards for default of notice: Held, that the claim for the full amount of salary for two years only must be allowed. *In re Independant Insurance Company, Ex parte Cope*, 20 L. J. (N. S.) Chanc. 28.

5. *Winding-up Act—Contributories—Certificate of complete registration.*—The Master upon winding-up the company excluded certain shareholders from the list of contributories, on the ground that the requisitions of the statute 7 & 8 Vict. c. 110, in regard to the deed of incorporation, had not been complied with before the certificate of complete registration was obtained: Held, that the certificate of the registrar was sufficient evidence of complete registration, although all the requisite provisions might not have been fully complied with. *In re Independant Assurance Company, Ex parte Bird*, 20 L. J. (N. S.) Chanc. 30.

6. *Winding-up Act—Contributory—Contribution of expenses.*—A. went to a meeting held for the purpose of getting up a railway,



but left before the business commenced, and refused to have anything to do with it. Some time after, A., under the threats of the secretary of the company, and a protest of non-liability, paid certain sums towards the expenses of the company. These circumstances were stated in the affidavit of A.: Held, that A. was not a contributory within the meaning of the Joint-Stock Companies Winding-up Act. *In re Direct Exeter, Plymouth and Devonport Railway Company, Ex parte Hall*, 19 L. J. (N. S.) Chanc. 386

7. *Winding-up Act—Contributory—Letter of allotment—Condition.*—A. applied for shares in a railway company. A month after the application he received a letter of allotment, in which contained the words “not transferable;” and a declaration that if the deposit was not paid within a month, the allotment should be null and void. A. never paid the deposit: Held, that by reason of this declaration in the letter of allotment, A. was not a contributory. Whether the words “not transferable” would have had that effect, *quære*. *In re Direct Birmingham, Oxford, Reading and Brighton Railway Company, Ex parte Capper*, 19 L. J. (N. S.) Chanc. 394.

8. *Winding-up Act—Contributory—Powers of Directors.*—A banking company was projected in June, 1836, and A. was one of the promoters and directors. The bank commenced business on the 9th of September. On the 24th of September it was agreed between A. and the other directors that A. should retire from the company. On the 18th of October the first signature was affixed to the deed of settlement, which, however, was dated in August. By that deed it was declared, that all the acts done by the directors previous to the execution of the deed should be ratified. On the 25th of October A.’s retirement from the company was advertised in the Gazette. In 1841 the company broke up, and was afterwards ordered to be wound up: Held, that A. was not a contributory. *In re Borough of St. Marylebone Joint-Stock Banking Company, Ex parte Busk*, 19 L. J. (N. S.) Chanc. 391.

9. *Winding-up Act—Contributory—Receipt of dividends—Executor.*—A., a shareholder in a company, died leaving B. his executor. B. did not comply with the formalities laid down by the deed of settlement as to executors becoming members of the company in respect of the shares of their testators, but received the dividends declared on the shares after the death of the testator: Held, that B., either in his own or his representative character, must be held to have made a contract with the directors, and ought to be put in the list of contributories. *In re North of England Joint-Stock Banking Company, Ex parte Gouthwaite*, 19 L. J. (N. S.) Chanc. 393.

10. *Winding-up Act—Discretion of the court as to the winding up companies—Banking company in India.*—The court has a discretion to refuse to order a company to be wound up, under the Joint-Stock Companies Winding-up Acts, where there is reason to believe that more harm than good would be done by the order, and that such order would not be necessary or expedient. A petition for winding

up a banking company established at Calcutta, with correspondents in London, which had suspended payments, and where a deed of arrangement had been executed in India, on the ground of an alleged improper carrying out of such deed in England, was dismissed. *In re Union Bank of Calcutta*, 19 L. J. (N. S.) Chanc. 388.

11. *Winding-up Act—Husband and wife.*—A., a feme sole, being entitled to shares in a company, married B. Nothing was done with the shares, which continued to be in the name of A. when A. died: Held, that B. was not liable as a contributory, under the Joint-Stock Companies Winding-up Act, 1848, in respect of losses or liabilities as to the shares before or after the coverture. *Vale of Neath and South Wales Brewery Joint-Stock Company, Ex parte Kluht*, 19 L. J. (N. S.) Chanc. 385.

12. *Winding-up Acts—Liability of provisional committee-man.*—The Master had placed the name of Mr. Clarke on the list of contributories, on the ground that he had allowed his name to be advertised as one of the provisional committee. Mr. Clarke had taken no shares in the company: Held, that a person being one of the provisional committee, did not of itself subject him to any liabilities, unless he had authorized expenses being incurred on his behalf. The Master's decision was reversed. *In re Falmouth, Helston and Penzance Railway Company, Ex parte Clarke*, 20 L. J. (N. S.) Chanc. 14.

13. *Winding-up Act—Directors, powers of—Contributory.*—A banking company was established in 1836. By one of the clauses of the deed of settlement the directors were empowered to act in such manner as would, in their opinion, best promote the welfare of the company, and, for that purpose, to make rules, bye-laws and provisional regulations. A. was an original director of the company, and held fifty shares in it. In 1838 an arrangement was entered into between A. and the other directors, under which A. was to retire from the direction, and give up his shares to the company at par. The company broke up in 1841, and was ordered to be wound up: Held, that the transaction of 1838 was not within the powers of the directors, and that A. was a contributory in respect of the shares held by him. *Borough of St. Marylebone Joint-Stock Banking Company, Ex parte Stanhope*, 19 Law J. (N. S.) Chanc. 389.

14. *Winding-up Act—Provisional committee-man—Contributory.*—Under the Winding-up Act, the name of a gentleman was placed by the Master on the list of contributories, who had become a provisional committee-man upon the understanding that he was not to incur any liability for expenses. No shares were allotted. Motion to reverse the Master's decision refused. *Croydon Direct West End Junction Railway Company, Ex parte Studeley*, 19 Law J. (N. S.) Chanc. 417.

15. *Winding-up Acts—Provisional committee-man not liable as contributory.*—The Master placed Mr. Carmichael on the list of contributories to this company as a provisional committee-man, and as an allottee of 100 shares: Held, that the evidence was not suffi-

cient to show that Mr. Carmichael had bound himself to take any shares, and that he being only in the position of a provisional committee-man, who had not authorized any expenditure on his behalf, his name must be expunged from the list of contributories. *In re West Coast Railway Company, Ex parte Carmichael*, 20 Law J. (N. S.) Chanc. 12.

CONSTRUCTION. See DEED. DEVISE. WILL.

CONTRIBUTORIES. See COMPANY.

CONVERSION.—The testator gave his real and personal estate to trustees upon trust to apply the rents, issues and proceeds for the benefit of his two daughters, with a direction, on the youngest attaining twenty-one, to divide the whole into two equal moieties, of which the testator gave one moiety to his two daughters equally, and directed the other to be placed out upon government or real securities, and the dividends and interest thereof to be paid to the daughters for their lives, and, upon their death, the said monies and effects to be divided amongst their children: Held, that there was no conversion by the will of the moiety of the real estate devised to the daughters on the youngest attaining twenty-one. *Cormick v. Pearce*, 7 Hare, 477.

COPYRIGHT OF DESIGN.—1. Under the Copyright of Designs Act, 5 & 6 Vict. c. 100, the proprietor of a design protected by the act is entitled to an injunction restraining, not merely the sale, but the manufacture of any article to which the design is applied during the period of the protection. Form of order on compromise, staying all proceedings, except on breach of an injunction. *Mac Rae v. Holdsworth*, 2 De Gex & S. 496.

2. *Injunction*.—The protection of copyright for three years, granted by 6 & 7 Vict. c. 65, to “any new or original design for any article of manufacture having reference to some purpose of utility, so far as such design shall be for the shape or configuration of such article,” is not clearly applicable to the design of a “protector label,” which consisted in making in the label an eyelet-hole, and lining it with a ring of a metallic substance, through which a string attaching the label to packages passed. The court refused to grant an injunction before the hearing against an infringement of such design. *Quære*, the meaning of the words “shape or configuration” in the act. *Margetson v. Wright*, 2 De Gex & S. 420.

COSTS OF DISCLAIMING DEFENDANT.—The assignee in insolvency of a sub-mortgagor disclaimed: Held, that he was not entitled to his costs. *Clarke v. Wilmot*, 1 Y. & C. C. C. 53, observed upon. *Stafforth v. Pott*, 2 De Gex & S. 571.

COSTS.—*Tenant for life*—10 & 11 Vict. c. 96.—Under the act for the indemnity of trustees, a tenant for life petitioned for payment

of the dividends to her: Held, the general personal estate of the testatrix being exhausted, that the costs of the petition must be paid out of the income, and not out of the principal. *In re Lorimer*, 19 Law J. (N. S.) Chanc. 524.

And see EXECUTOR. ADMINISTRATION SUIT. RAILWAY PRACTICE.

**COUNTY COURT.**—*Jurisdiction of Court of Chancery—Prohibition.*—The judges of the courts of common law being upon the circuit, a prohibition out of the Petty Bag Office was applied for and was granted by the Court of Chancery to the judge of the County Court to prevent him from carrying into execution a judgment obtained therein upon a matter stated not to be within its jurisdiction. *Wright v. Cattell*, 19 Law J. (N. S.) Chanc. 527.

**CREDITORS, CONSENT OF, TO SUIT.** See BANKRUPT.

**CUSTODY OF INFANTS.**—Before the jurisdiction of the court to deprive a father of the guardianship of his children can be called into action, the court must be satisfied that the father has so conducted himself, or placed himself in such position, as to render it not merely better for the children, but essential to their safety or welfare, that the father's right should be interfered with (except in the cases within the 2 & 3 Vict. c. 54). Although the circumstance of the children being in the custody of the mother excludes the 2 & 3 Vict. c. 54, the provisions of that act are proper to be regarded in considering an application by her to retain such custody, and to restrain the father from interfering with it. Conduct showing the father to be a person to whose guardianship it would be very objectionable to intrust children, held sufficient ground for depriving him of their custody, and for providing otherwise for their care and maintenance, and education, where such a provision can, by an actual appropriation of property, be effectually secured. But where the only security proposed was a deed of covenant of the infant's mother-in-law to provide for the maintenance and education of the children for her life: Held, that such conduct was not sufficient to enable the court to interfere. *In the Matter of Robert Fynn, Alfred Fynn and Emily Fynn (Infants)*, 2 De Gex & S. 457.

**DEBT, PROOF OF JOINT, AGAINST ESTATE OF PREDECEASING DEBTOR.**—Where an intestate and another had mortgaged a leasehold estate, of which they were tenants in common, to secure payments in respect of shares held by them on a benefit building society, and had entered into a joint covenant to make the payments, but were not partners, and had no joint estate, and the intestate's codebtor was sworn to be in insolvent circumstances: Held, that the covenantee was not entitled to prove as a specialty creditor under a decree for the administration of the intestate's estate. *Crossley v. Dobson*, 2 De Gex & S. 486.

**DEED.**—1. *Construction—Ignorance of fact.*—Under the will of

a testator who died in India, A. was entitled during the life of his wife to the income of property in the course of being transmitted from India, and B. to the capital after her death. By a deed, reciting that certain arrears of interest were due to A. in respect of monies remitted, and that certain sums (specifying them) still remained due to the testator's estate in India, which were carrying interest, and also reciting that B. had paid 2000*l.* in discharge of A.'s debts, and that A. in consideration thereof had agreed absolutely to assign to A. all his interest in the estate of the testator, it was witnessed that, in consideration of the premises, A. absolutely assigned to B. (in the most comprehensive terms) all his interest in the monies received or to be received in respect of the testator's estate, with a general release of all claims in respect of the same. At the date of the deed both parties were ignorant of the existence of a sum of 12,000*l.*, part of the assets, which had been received and fraudulently retained by the executor. On a bill by the executors of A., praying a declaration that, upon the true construction of the deed, A.'s interest in the 12,000*l.* did not pass thereby: Held, reversing the decree of the court below, that the mutual ignorance of the existence of this sum was not sufficient ground for limiting the effect of the general words. *Semble*, if the bill had been to reform the deed, the circumstances would not have raised an equity for relief. *Howkins v. Jackson*, 19 Law J. (N. S.) Chanc. 451.

2. *Construction—Limitation to one for life, and upon her death to her children then living.*—A sum was vested in trustees upon trust declared by deed. The deed recited an intention to make some provision for A. and her children, and declared that the trustees should hold the fund for A. for life, and upon her death, or doing any act to incumber her interest, the trustees were to stand possessed, "if there should be one child of A. then living, the said stock to be an interest vested in such child at twenty-one, and to be paid accordingly, if such age should happen after the death of A., and if not, immediately on her death or making any charge." And if there should be two or more such children, then the stock to be transferred amongst such children in equal shares at the age of twenty-one, if A. should be dead; but if not, then immediately after her decease or having made such incumbrance. The deed contained clauses of survivorship, in case of any child dying under twenty-one, as to "the share intended to be thereby provided for such child dying," and also clauses for maintenance, advancement and accruer. There were several children, one attained twenty-one, and died in the life of A.: Held, that her representatives did not participate in the fund. *Skipper v. King*, 12 Beav. 29.

DEEDS, PRODUCTION OF.—*Possession not admitted—Bill of revivor—Administrator of deceased defendant.*—An order for the production of deeds, &c., will not be made against the administrator of a deceased defendant, though the suit has been revived, and though an order has been previously made against the defendant himself,

there being nothing to show that they were in the possession of the administrator. *Scott v. Wheeler*, 19 Law J. (N. S.) Chanc. 402.

**DEMURRER.**—*Corporation and directors.*—A shareholder in an incorporated railway company filed a bill on behalf of himself and other shareholders to restrain the directors from issuing preference shares, on the ground that they were about to be issued contrary to the company's acts, and for the purpose of constructing the original line instead of the branch (for which alone additional shares were to be created), and were intended to be distributed in a manner contrary to the directions of the act which authorized the creation of additional shares. The bill, filed on the 22nd of September, stated, that the plaintiff, on the 17th of September, became aware of resolutions passed on the 12th of September under which the preference shares were to be offered to the shareholders on the 23rd of September; but the bill did not otherwise show that the plaintiff had not the means of procuring a suit to be instituted in the name of the corporation: Held, on the demurrers of the corporation and of the directors to the bill, that these demurrers could not be overruled, consistently with the principles stated in, or to be extracted from, *Mosley v. Alston*, and *Exeter and Crediton Railway Company v. Buller*, whether the proceedings sought to be restrained were legal or not. 2. On the bill being amended, and stating that a majority of the shareholders supported the views of the directors, and refused to authorize the plaintiff, or any other person, to institute a suit in the name of the company: Held, allowing a demurrer, that it was still within the influence of the above authorities. 3. The corporation and the directors having demurred separately, the court refused to give costs of more than one demurrer. 4. *Semble*, that there is not sufficient precision in the class purported to be represented by a plaintiff who sues on behalf of himself and all other the shareholders in an incorporated company, "except such of the said shareholders as are respectively represented by those shareholders hereinafter named defendants." *Edwards v. Shrewsbury and Birmingham Railway Company*, 2 De Gex & S. 537.

**DEVISAVIT VEL NON.**—The only course taken in a suit to establish a will, is to direct an issue; but the object of this being to satisfy the court directing it, a verdict, at once the result of a well-conducted and fair trial, and the affirmation of what is by that court itself thought to be the truth, ought not to be disturbed without substantial ground for believing that on a second trial other evidence of a weighty nature bearing against the existing conclusion can and will be produced; and therefore where no substantial ground for such belief was shown, the court refused to grant a second trial when an allegation of a matter of fact has been once fairly investigated between the litigating parties before a competent judicature, the unsuccessful party not having been taken by surprise, nor being able to allege mistake, accident, or any subsequent discovery of a material kind,



the investigation should be considered sufficient, and the judgment thereupon conclusive as between those parties. It is within the ordinary practice of the Court of Chancery to make a decree conclusively affecting the freehold and inheritance of land upon one investigation of disputed facts as well where there must be a jury as where it is in the discretion of the court to have or dispense with a jury, and although there has been no consent or acquiescence on the part of the unsuccessful party desirous of further investigation. Where there has been an establishing suit and verdict in favour of the plaintiff, the heir is not entitled to more favour than a devisee, unless in the sense that the burden of proof in that case is upon the plaintiff. It is properly incident to an issue between the devisee and heir, that one trial should be conclusive between the parties, though the conduct of the unsuccessful party may have been perfectly fair, and although neither consent nor acquiescence can be alleged against him; and this is equally true, whether the issue relates to a will questioned by a plaintiff or a defendant in equity. *Waters v. Waters*, 2 De Gex & S. 591.

**DEVISE.**—*Construction of estate for life—Gavelkind tenure.*—Devise of lands of gavelkind tenure to trustees, upon trust to sell a competent part for the payment of debts, and subject thereto upon trust for P. M. for life, and after his decease for the first son of such first son, and the heirs male of his body; and in default of such issue, for every other son of P. M. successively for the like interests and limitations; and in default of such issue, for every other son of P. M. successively for the like interests and limitations; and in default of issue of the body of P. M., or in case of his not leaving any at his decease, for T. M. for life; and after his decease, for T. G. M., the eldest son of T. M., for life; and after his decease, for the first son of T. G. M., and the heirs male of his body; and in default of issue of the body of the said T. G. M., for every other son of T. M. successively for the like estates and interest; and on failure of all such issue of the body of T., upon trust for him, his heirs and assigns for ever, provided that if P. M. or T. M., or any of their issue, should become entitled to the Jodrell estate, then the trustees should stand seised of the devised premises upon trust for the next person entitled thereto under his will, as if the person so succeeding to the Jodrell estate were dead. T. M. died after the date of the will, and the testator, by a codicil, declared that his trustees should stand seised of the devised estates upon trust for his wife for her life, and from and after her decease upon the trusts declared by his will, subject to the declaration therein contained with reference to the Jodrell estate: Held, that P. M. took an estate for life only; that T. G. M. took an estate for life in remainder after the life estate of P. M., contingent on P. M. not leaving any issue at his decease, and determinable on his becoming entitled to the Jodrell estate; that the eldest son of T. G. M. took a contingent remainder in tail after the determination of the life estate of his father. *Monypenny v. Dering*, 7 Hare, 568.

**DIRECTORS.** See **COMPANY.**

**DIVIDENDS.** See **GENERAL LEGATEE.**

**DOCUMENTS.**—1. *Motion for production of.*—Where executors and trustees by their answer admitted six books to be in the custody or power of their agent in Scotland, where part of the testator's property was, and the agent, on a motion for a production, deposed that he was agent for many other persons, and that his books related to the affairs of such other persons as well as to those in question in the cause: Held, that the executors had not thereby so mixed the testator's accounts with others as to preclude them from insisting that the books were not in their power; and a motion for production was refused as to these books. *Airey v. Hall*, 2 De Gex & S. 489.

2. *Production of.*—The guardians of the poor of Southampton restrained from paying out of the poor rates the expenses incurred by them in making an unsuccessful application to parliament for an act to authorize them to rate the owners, instead of the occupiers, of small tenements. *Att.-Gen. v. Guardians of Poor of the Southampton Union*, 17 Sim. 6.

3. *Same.*—Letters alleged by a defendant to have passed between him and his solicitor in the course of and for the purpose of professional business, which the solicitor was employed to transact for him, and a case alleged to have been professionally and confidentially submitted to counsel by the solicitor of the defendant, and on his behalf, and the opinion thereon, held not to be privileged. But a case alleged to have been submitted to counsel by the defendant's solicitor in contemplation of legal proceedings, and with reference to the title of the defendant, at issue in the present suit, and the opinion thereon, held to be privileged. *Beadon v. King*, 17 Sim. 34.

4. *Same.*—Where the entries in the trade books of a defendant may show the infringement by him of an alleged custom for the benefit of the plaintiff, the court will order the production of the trade books for the inspection of the plaintiff before the hearing, and before the existence of the custom has been proved, notwithstanding the existence of such custom is denied by the answer of the defendant. *Ord v. Fawcett*, 19 Law J. (N. S.) Chanc. 487.

5. *Same.*—A bill was filed by the heir-at-law of a testator, against a purchaser from his devisees in trust for sale, to set aside the conveyance on the ground that the purchaser had acted as solicitor to the devisees, and the consideration was inadequate. The defendant, by his answer, insisted that the title was materially defective, and, regard being had to that, the consideration was adequate; and he admitted possession of the title deeds: Held, that the title deeds must be produced. *Shallcross v. Weaver*, 19 L. J. (N. S.) Chanc. 450.

6. *Same—Restriction of user to purposes of suit—Practice.*—On motion for production of deeds the defendant asked that the plaintiff might be prevented using them for any collateral purposes, alleging that there were proceedings at law pending. The court, however, de-

clined so to restrict the order. *Lagg v. South Devon Railway Company*, 12 Beav. 151.

See EVIDENCE.

**ECCLESIASTICAL CORPORATION.**—*Lease — Railway company.*—A railway company took some land which had been demised by the dean and chapter of G., for twenty-one years, to a lessee on a beneficial lease. The company settled separately with the lessee, and purchased the reversionary interest of the dean and chapter, and this purchase money was ordered to be invested in consols: Held, that the dividends to accrue on this stock until the expiration of the term were not payable to the dean and chapter, but ought to be accumulated. *Ex parte Dean and Chapter of Gloucester*, 19 Law J. (N. S.) Chanc. 400.

**ELECTION.**—*Devisee — Heir-at-law.*—A testator being entitled to an undivided moiety in two freehold houses, U. and N. (the other undivided moieties belonging to M. B., his niece and heiress-at-law, subject to the interest of her father as tenant by the curtesy), and also to a leasehold house, devised to S. P. “all my freehold house, U.,” and bequeathed to M. B. “all my moiety of and in a leasehold house at,” and directed that the rents should accumulate during the minority of M. B., and be paid to her at her full age. The testator died in 1812. The father of M. B. received the rents of the leasehold house until the expiration of the lease in 1819, and on M. B. coming of age in 1831, he accounted with her for these rents, and paid over to her a balance of 49*l.* in respect thereof. In 1832 M. B. made a mortgage in fee of her moiety of U., and the entirety of N., and on her marriage in 1833 settled the same to the use of herself and intended husband, and the issue of the marriage. Afterwards S. P., the trustees of the settlement, and the father of M. B., joined in granting a lease for years of the freehold house U. In 1847 S. P. filed his bill: Held, upon appeal, that the testator, by his devise of “all my freehold house,” intended to pass the entirety, and that M. B. was bound to elect whether she would take under the will or as heiress-at-law; but that the receipt of the rents of the leasehold house by her father, and her acceptance of the balance, 49*l.*, did not, under the circumstances, amount to a declaration of election, and that M. B. electing at the hearing to take against the will must account to the plaintiff for the rents of the leasehold house. *Padbury v. Clark*, 19 Law J. (N. S.) Chanc. 533.

**EXECUTOR.**—*Costs under Trustee Indemnity Act.*—Where an executor pays a legacy into court under the Trustee Indemnity Act, (10 & 11 Vict. c. 96,) his costs of paying it in are to be borne by the estate; but those of paying it out by the legatee. *In re Cawthorne*, 12 Beav. 56.

**EXECUTORS AND ADMINISTRATORS.**—One of the creditors of an insolvent died intestate, leaving the insolvent one of

his next of kin: Held, that the administrators of the creditor were not entitled to retain the debt out of the insolvent's distributive share of the creditor's estate. *Bell v. Bell*, 17 Sim. 127.

And see COMPANY.

FUTURE RENTS. See CHARITY.

GAVELKIND. See DEVISE.

GENERAL LEGATEE. — *Long annuities — Dividends.* — General legatee of "the sum of £ long annuities," held not entitled to dividends accruing before the expiration of a year from the testator's decease. *Collyer v. Ashburner*, 2 De Gex & S. 404.

GENERAL ORDERS. See PRACTICE.

GUARDIAN AD LITEM. See PRACTICE.

HUSBAND AND WIFE. See COMPANY.

INCOME TAX.—*Vendor and purchaser.*—A purchaser paying his purchase money with interest into court, is not to deduct the income tax payable on the interest. *Humble v. Humble*, 12 Beav. 43.

INDIAN BANK. See COMPANY.

INFANTS. See CUSTODY OF.

INJUNCTION.—1. The bill was filed to restrain proceedings at law. After the common injunction was obtained, the defendants answered and moved to dissolve the injunction, and the plaintiffs undertook to show cause on the merits. The plaintiffs then amended their bill. On the case coming on for cause to be shown against dissolving the injunction, the court gave the defendants their option, first, to have the motion heard on the record as it stood; or, secondly, to have it stand over, with liberty for the defendants to give notice of motion to dissolve, under the 60th Order of 1845, or otherwise; or, thirdly, to have it stand over, with leave for the defendants to answer the amended bill. *West Durham Railway Company v. Allison*, 2 De Gex & S. 558.

2. *Patent—Bill of exceptions.*—A special injunction, on notice, to prevent the infringement of a patent, refused, on the ground of delay, notwithstanding the court had a strong impression in favour of the plaintiff's right. An injunction was refused, and the plaintiff put to establish his legal right. He was successful on the trial, but the defendants tendered a bill of exceptions. An injunction was granted, under the circumstances, before the bill of exceptions had been disposed of. *Bridson v. Benecke*, 12 Beav. 1.

3. *Shares of company.*—At a meeting of a railway company on the 31st May, 1848, it was resolved that 1,055,000*l.* should be raised by 105,500 preference shares of 10*l.* each, on which a fixed dividend of 6*l.* per cent. should be paid. On the 7th July, 1848, one of the dissentients filed a bill, praying a declaration that this resolution was unauthorized by the company's act, and praying for an injunction against the issue of such shares, and no other specific relief. Upon a motion made on the 7th August, 1848, for an injunction accord-

ingly, it appeared by the affidavit of the secretary that the preference shares had been offered to all the shareholders rateably, and had been taken to the amount of 777,770*l.*, on which the first instalment had been paid, and that other shareholders had expressed their desire to accept other shares, and that there were only five dissentients: Held, that the motion involved substantially the whole matter in dispute in the cause; and (having regard to the balance of the possible mischief arising from interfering or not interfering on an interlocutory application) must be refused. *Fielden v. Lancashire and Yorkshire Railway Company*, 2 De Gex & S. 531.

**INSOLVENCY.—Priority—Judgment.**—An insolvent within a year previous to his insolvency executed a mortgage upon certain property, with a power of sale for the mortgagee to pay himself off, and the residue to go to the insolvent, his appointees and assigns. The insolvent had subsequently executed a warrant of attorney to the plaintiff, on which judgment was entered up, and he was taken in execution. He then presented his petition under the Insolvent Act, and before his discharge the mortgagee sold under his power of sale: Held, that the plaintiff was entitled to priority in respect of his judgment over the other creditors of the insolvent. *Robinson v. Hedger*, 19 Law J. (N. S.) Chanc. 463.

**JUDGMENT.** See **INSOLVENCY**.

**JURISDICTION OF CHANCERY.** See **COMPANY**.—**COUNTY COURT.**

**JURISDICTION.**—1. *Vice-Chancellor of England.*—The Vice-Chancellor has no jurisdiction to discharge, for irregularity, an order made as of course, at the Rolls, though in a suit attached to his own court. *Stuart v. Stuart*, 17 Sim. 44.

2. *Winding-up Acts—English and Foreign Joint-Stock Company.*—An Anglo-Belgian company, constituted a société anonyme, with domicile at Brussels, a board of directors there and in London, and shares divisible equally between English and Belgian allottees, was formed for making a railway and canal in Belgium, but being unable to complete the undertaking within the time limited, contracted, with the concurrence of the Belgian government, to lend the caution money to other railway companies for a definite period: Held, on the petition of an English shareholder, that the company was within the operation of the Winding-up Acts, and that notwithstanding the collateral contract into which the company had entered the court had jurisdiction to adjudicate in respect of the English shareholders. Reference ordered to the Master to inquire whether the original undertaking had been finally abandoned or merely suspended, and could hereafter as between the company and the Belgian government be resumed; and if abandoned, or incapable of being resumed, whether it would be expedient to make an order to wind up the affairs of the company. *Dendre Valley Railway and Canal Company, Ex parte Moss*, 19 Law J. (N. S.) Chanc. 474.

**LEASEHOLDS.**—*Enjoyment in specie*—*Will.*—Testator gave all his leasehold estate and all other his estate and effects to trustees on certain trusts for the benefit of his wife and daughters and the children of the latter, and in declaring the trusts he used the term “rents” as well as dividends and annual proceeds, and he empowered the trustees of his will for the time being to sell his leasehold estates, and to invest the proceeds on mortgage of freehold or other leasehold estates, and to lease any part or parts of his said estates: Held, in suit to carry the trusts of the will into execution, that the leaseholds were not to be sold. *Bowden v. Bowden*, 17 Sim. 65.

**LEASES OR FINES.** See CHARITY.

**LEGACY.**—1. *Void bequest as being contrary to Christianity—Uncertainty.*—A testator gave a legacy for the best essay on the subject of “Natural Theology,” treating it as a science, and demonstrating the truth of the evidence upon which it was founded, and the perfect accordance of such evidence with reason, also demonstrating the adequacy and sufficiency of natural theology when so treated as a science to constitute a true, perfect and philosophical system of universal religion. The testator also gave a legacy for the best essay upon “Emigration to America.” Held, that the first bequest was void as being inconsistent with Christianity, and the second bequest was void for uncertainty. *Briggs v. Hartley*, 19 Law J. (N. S.) Chanc. 416.

2. *Will—Construction.*—Testator gave the whole of his personal property after payment of his debts to his wife during her widowhood, remainder to his son, his only child, and if his son should die under twenty-one, he expressed it to be his wish to give 500*l.* to each of his brothers and sister, Joseph, James and Mary, and any further surplus to be equally divided between these, my said brothers and sister, or their legal heirs and successors. The testator’s son survived him and died under twenty-one. His brother Joseph died in his lifetime: Held, that the gift of the farther surplus of the testator’s property after the three sums of 500*l.* each should be subtracted from it, and that the legal heirs and successors of the brothers and sister were not intended to take unless all of them died so as not to take, and consequently that there was an intestacy as to the 500*l.* and the shares of the further surplus given to Joseph. *Gibson v. Hale*, 17 Sim. 129.

**LIEN.** See EVIDENCE.

**LIMITATION FOR LIFE.** See DEED.

**LUNATIC.**—*Maintenance—Purchase of a government annuity.*—Where the whole income of the lunatic amounted only to 21*l.* 16*s.* 11*d.*, being the dividends arising out of a sum of stock to which the lunatic was entitled, the court allowed an annuity of 30*l.* for the life of the lunatic to be purchased and paid for out of the fund. *In re Fisher*, 19 Law J. (N. S.) Chanc. 521.



**MARRIED WOMEN.**—*Engagements of, affecting separate estate.*—A married woman having separate property and living apart from her husband, entered verbally into an agreement to take a leasehold house for a term. The agreement was reduced to writing and signed by the lessor's agent and handed to her. She retained it but did not execute it or any counterpart. In letters however written by her and by her solicitors, it was referred to as an agreement that she had entered in possession of the house. In a suit by the lessor to enforce payment of the rent according to the agreement as a charge upon her separate estate, the court directed a reference as to the lessor's title. Waiver of production of lessor's title cannot be insisted on by him in his suit for a specific performance of an agreement for a lease, unless it is expressly alleged by the bill. *Gaston v. Frankum*, 2 De Gex & S. 561.

**MISNOMER.** See PRACTICE.

**MORTGAGE.**—1. *Costs.*—A mortgagor devised the mortgaged estate to a person who did not accept the devise, and did not take or claim any benefit under the will. A bill of foreclosure was filed against him without any allegation that he had been asked to accept the devise. He put in a disclaimer and the cause was brought to a hearing: Held, that he was entitled to his costs to be paid by the plaintiff. *Higgins v. Frankis*, 20 Law J. (N. S.) Chanc. 16.

2. *Investment on.*—Petition of tenant for life for an inquiry whether it would be for the benefit of infant tenants in remainder to transmute trust fund from consols to a mortgage security under a power, dismissed on the ground that the expenses incidental to the latter security generally more than counterbalanced the increase of income. *Barry v. Marriott*, 2 De Gex & S. 491.

**NEXT OF KIN.**—*Statute of Distributions—Construction of a settlement.*—In a marriage settlement a sum of stock was given to trustees after the death of the husband and wife, upon trust in case the wife died first "for such person or persons as at the time of the death of the husband should be the next of kin of the wife, and would be entitled to her personal estate and effects, his, her and their executors, administrators and assigns, as if she had died sole and unmarried." The wife died first, leaving five brothers and sisters. On the death of the husband only one brother was living, but there were children of the other brothers: Held, that the brother surviving at the death of the husband took the whole fund as the next of kin designated in the settlement. *In re Webber*, 19 Law J. (N. S.) Chanc. 445.

**PARENT AND CHILD.**—*Custody of infant.*—Mr. T. married Miss N. in July, 1845, and deserted her in February, 1846. In June, 1846, a child of the marriage was born. After the separation Mrs. T. went to the house of her mother, and there she and her child were maintained. Mr. T. after the separation resided at an establishment called "The Agapemone," in which a number of persons forming a kind of sect live. It was avowed by Mr. T. that he in common with

the other members of the establishment considered prayer to God as unnecessary and superfluous, and that they did not in any manner observe Sunday or acknowledge a Sabbath. Between the separation and 1850 Mr. T. had not taken the slightest notice of his wife or child, but in the spring of that year he made an attempt to possess himself of the child by force. The court ordered that under the circumstances Mr. T. should be restrained from removing or obtaining possession of his child. *Thomas v. Roberts*, 19 Law J. (N. S.) Chanc. 506.

**PARTIES.**—*Trustee and cestuis que trust—Dissenters' chapel.*—The trustees of a dissenting chapel mortgaged it under their powers, and the deed contained a power of sale. The mortgagee conveyed it to A. B., and in a suit by the trustees insisting that A. B. was mortgagee and not a purchaser from the mortgagee: Held, that some of the subscribers were necessary parties. *Minn v. Stant*, 12 Beav. 190.

**PARTIES PLEADING TO BILL.** See RAILWAY COMPANY.

**PARTNERSHIP.**—*Agreement to dissolve.*—By agreement a partnership between two solicitors was to be dissolved, the accounts taken, and the continuing partner to pay an annuity quarterly for three years to the retiring partner. The latter died before the expiration of the third year, without having received any part of the annuity: Held, on bill filed within six years from his death, but after six years from the quarter-day preceding it, that the annuity was part of the agreement, and that his representative was entitled to specific performance of the whole of the agreement, irrespective of the question whether he was not barred by the Statute of Limitations from recovering the annuity in a court of equity. *Murray v. Parker*, 19 Law J. (N. S.) Chanc. 530.

**PATENT.** See INJUNCTION.

**PAUPER.**—*Order to sue in formâ pauperis—Suppression of facts—Discharge.*—A plaintiff was entitled to an annuity of 20*l.* a year, which her brother ordered to be secured to her. She filed a bill to have it secured, and obtained an order to sue in formâ pauperis. The executors of her brother, though they did not admit assets, paid the annuity, but this fact was not stated to the court, and in consequence the order to sue in formâ pauperis was discharged. *Butler v. Gardiner*, 19 Law J. (N. S.) Chanc. 473.

**PAYMENT OF MONEY INTO COURT.**—*Decree—Answer—Admissions.*—After a decree in a cause, a motion that the defendants might pay into court money which by their answer they admitted to be in their hands was refused with costs. *Wright v. Lukes*, 20 Law J. (N. S.) Chanc. 32.

**PLEADING.**—1. Where the case made by the bill was, that a trust deed which it sought to set aside was the produce of sheer imposture and plain cheating, and was obtained by means of a successful

conspiracy between the defendant and his solicitor, whereby the plaintiff was entrapped into the execution of the deed under the fiction that it was an instrument of a totally different kind, and evidence was only adduced to prove that the plaintiff was a very ignorant and illiterate person, easily imposed upon, and that she executed the deed in question without distinct explanation, and without the advice of her own solicitor, who resided near to, and whom she expressed a desire to consult: Held, that the case, as it appeared upon the evidence, was not sufficiently put in issue by the bill to enable the court to set aside the deed; but the court gave the plaintiff an option of an issue to try whether the execution had been fraudulently obtained, and the plaintiff declining such issue, the court, having regard to the evidence adduced, though the imputations in the bill on the defendant and on his solicitor were grave, dismissed the bill without costs. On the 16th of May, 1846, a widow made an improvident settlement of a large portion of her property, and married on the 15th of October following. The husband and wife filed a bill praying that the deed might be set aside as a fraud on the marital right. *Semble*, that the court would have given relief, notwithstanding the wife was a co-plaintiff, if an engagement to marry preceding the transaction, and a subsequent marriage without notice to the husband, were proved; and the court offered the plaintiff an issue to try the fact. *Griggs v. Staplee*, 2 De Gex & S. 572.

2. *Exception—Impertinence.*—Plaintiffs filed a bill against executors for the administration of their testator's estate, and for payment of a debt alleged to be due to them from the estate of the deceased. The interrogatories were framed with great minuteness, requiring the executors to set forth all the particulars relating to the testamentary property, and whether the defendants, or one, and which of them, do or does not refuse to pay the plaintiffs the amount of their demand, or some and part thereof, and why one of the executors, in answer to the interrogatories, stated various facts relating to previous money transactions between himself and the plaintiffs as a reason for doubting the accuracy of the plaintiff's claim. Exceptions were taken to the answer for impertinence, and allowed by the Master. Upon exceptions to the Master's report, the court held that the defendant was justified, in answer to the pointed form of the interrogatories, in setting forth what he had done; and the exceptions to the Master's report were allowed. *Robson v. Lord Brougham*, 19 Law J. (N. S.) Chanc. 465.

PLEADING. See ANSWER.

PORTIONS.—*Settlement—Construction.*—By a marriage settlement dated in 1787, 1000*l.*, the wife's property, was vested in trustees in trust for the wife and her husband for their lives successively, and after their several deceases, and the death of the survivor of them, in case there should be any child or children of the body of the husband or the body of the wife lawfully begotten which should be then living, in trust to pay the 1000*l.* unto such children equally, and if there

should be but one such child living, then in trust for such only child, and to be paid to such child or children at their respective ages of twenty-one, and in the meantime the interest of each child's share to be applied for its maintenance; and in case there should be no such child living at the death of the survivor of the husband and wife, or in case of there being such, and all of them should die before they should attain twenty-one, then the 1000*l.* to be in trust for the wife's father. By a deed dated in 1793, the wife's father made a voluntary settlement of leaseholds and 500*l.* stock in trust for the wife for life, remainder in trust for all her children then born, or thereafter to be born, who should be living at her decease, equally, and to be assigned and paid to them at their respective ages of twenty-one, and in the meantime the income to be applied for their maintenance; and if any of them should die before their shares become payable or assignable, their shares to go to the survivors; and in case all the children should die under twenty-one, the property to be in trust for the settlor. The husband and wife had three children. The wife survived the husband. Two of the children died in her lifetime, one of them having attained twenty-one. The third attained twenty-one, and survived the wife: Held, that that child was entitled to the whole property comprised in the deeds. *Jeffery v. Jeffery*, 17 Sim. 26.

**POWER.** See **WILL.**

**POWER OF SALE.**—Testatrix gave, devised and bequeathed all the rest, residue and remainder of her estate, real and personal, not specifically disposed of by her will, after payment of her debts, &c., to trustees upon trust to invest the same in the funds or on real security, or, at their discretion, to keep the same in their then state of investment; and in a subsequent part of her will she declared that the receipts of the trustees for the purchase money of any trust property sold by them under her will, should be good discharges to the purchasers of such property: Held, that the trustees were authorized to sell a real estate comprised in the residuary devise, although the testatrix's debts, &c., had been paid. *Affleck v. James*, 17 Sim. 121.

**PRACTICE.**—1. *Claim under the 6th Order of April, 1850—Signature of counsel.*—Upon motion for leave to file a claim to take certain partnership accounts alleged to have been irregularly kept, and for an injunction: Held, that the orders were not intended to apply to a special case of this nature: Held also, that such claims did not require the signature of counsel. *Carmichael v. Ogilby*, 19 Law J. (N. S.) Chanc. 424.

2. *General Orders—Preliminary inquiries.*—If one of the defendants is out of the jurisdiction, and it is objected by the answers of others, that persons not parties to the suit claim an interest in the subject-matter, the court will not order a reference for preliminary inquiries and accounts, under the 5th General Order of the 9th of May, 1839. *Darbyshire v. Home*, 19 Law J. (N. S.) Chanc. 458.

3. *Guardian ad litem.*—Defendants of unsound mind, but not found

so by inquisition, on the last day allowed them for putting in their answers, obtained from the Master an order for two months further time to answer, and then obtained by petition at the Rolls an order for liberty to sue out a commission to assign them a guardian ad litem. An application by the plaintiff, under the 32nd Order of May, 1845, to assign them a guardian ad litem, on the ground of default in not putting in their answer, was refused with costs. *Saunders v. Walter*, 19 Law J. (N. S.) Chanc. 409.

4. *Payment out of court of petty sums.*—In cases of very small sums, standing to a separate account in court, and where the title is simple, the court, to save expense, will order payment upon petition, without attendance in court. *Petty v. Petty*, 12 Beav. 170.

5. *Payment out of Court—Presence of legal personal representatives.*—Where a fund stands to the general credit of a cause, it will not be paid out in the absence of the legal personal representatives. But if, after decree, and where the fund is clear, the executor dies, a supplemental bill is not always necessary, for the fund may be distributed on petition upon the appearance of the new personal representatives. *Parsons v. Groome*, 12 Beav. 180.

6. *Plea—Misnomer of plaintiff.*—A defendant by plea stated that the plaintiff, J. H. H. C., was commonly called Viscount Alford, and not Viscount Alfred, as stated in the bill, and submitted to the court whether he should make further answer: Held, that the defendant might have guarded himself from the error, and was not to be excused from answering; and that the plaintiff was not to be compelled to correct the error at the expense of giving the defendant further time to answer the bill; and the plea was overruled with costs. *Cust v. Southee*, 19 Law J. (N. S.) Chanc. 526.

7. *Special order to amend.*—Special orders to amend must be obtained upon the affidavit of the plaintiff and the solicitor. On obtaining a special order to amend, it is not necessary that the affidavit mentioned in the 68th General Order of May, 1845, should state all the amendments to be made in the bill. *Payne v. Little*, 19 Law J. (N. S.) Chanc. 459.

And see INJUNCTION. COSTS. SEPARATE ACCOUNT.

PRINCIPAL AND SURETY.—*Creditor—Arrangements reserving rights against surety—Married woman—Separate estate—Receiver.*—Farley & Co., bankers, were creditors of the firm of H., B. & Co., which consisted of M. A. H. and J. B. S. H., who was a married woman, having property settled for her separate use, joined as surety with J. B. in several promissory notes and bills of exchange to F. & Co., to secure the debt due to them from the firm of H., B. & Co.; the firm of H., B. & Co. being greatly in debt to F. & Co. dissolved partnership. Articles of agreement were entered into between M. A. H. and J. B. and F. & Co., which provided that J. B. should carry on the business alone, that J. B. should pay the debt due to F. & Co. by monthly instalments. F. & Co. also agreed not to sue M. A. H. or require payment from her of the partnership debt; but the remedies of F. & Co. against the sureties of M. A. H. and

J. B. were expressly reserved. This bill was filed by F. & Co. to make the securities of S. H. as surety available, and upon a motion for a receiver of the income of her separate property: Held, that the deed made a material alteration in the relation subsisting between the creditors and principal debtors, but that from the state of the authorities respecting the reservation of the rights of creditors against sureties, the court was bound to give effect to what appeared to have been the law as administered in this court, and if the defendant could not give security for what the plaintiffs might recover out of her settled estate, to appoint a receiver to secure the fruit of the suit, if the law should be ultimately established in favour of the plaintiffs. *Owen v. Homan*, 19 Law J. (N. S.) Chanc. 549.

**PROVISIONAL COMMITTEE-MAN.** See COMPANY.

**PURCHASE WITH TRUST MONIES.**—*Principal and agent.*—The trustees of a marriage settlement, being empowered by it to invest the trust funds in freeholds or copyholds of inheritance, with the consent of the husband and wife, authorized the husband to purchase a certain estate, as an investment of part of the trust funds, and afterwards they sold out a sufficient part of those funds to pay for the estate, and the husband received the proceeds. The estate was copyhold for lives, and the purchase was made without the wife's consent: Held, nevertheless, that, as between the husband and the trustees, he must be considered to have purchased the estate for them. *Trench v. Harrison*, 17 Sim. 111.

**RAILWAY.**—*Costs of an intermediate investment*—*Railway company's acts, construction of.*—The L. and B. Railway Company, under their act, 1833, purchased land of Eton College, and in May, 1846, paid the purchase money into court. That act authorized the intermediate investment of such money in the funds, but was silent as to the costs of such investment. By the 8 & 9 Vict. c. cciv., the L. and B. Railway Company, and certain other companies, were consolidated and incorporated together under the style of the L. and N. W. Railway Company. By the first section the existing acts of the several companies were repealed and the companies dissolved, with a proviso that such repeal should not annul any purchase, &c., made thereunder; and by sect. 10, where any sum of money had been paid into the bank on account of the purchase of land by any of the dissolved companies, the same was to be disposed of pursuant to the act under which it had been paid in; and all the provisions of the repealed act, in relation thereto, were, for the purpose of this act, to remain in full force, &c.; and by sect. 11 the Lands Clauses Consolidation Act, 1845, was incorporated with this act. The 80th sect. of the Lands Clauses Consolidation Act, 1845, provided, that in the case of monies paid into the bank under that or the special act (the word "special" being interpreted by sect. 2 as an act to be afterwards passed), the costs of and incident to an intermediate investment in the funds should be borne by the company. Upon the petition of Eton College in 1849 for an investment of the purchase money in the



funds, it was held, that the L. and N. W. Railway Company were liable to pay to the petitioners the costs of such intermediate investment in the terms of the 80th sect. of the Lands Clauses Consolidation Act, 1845. Where the words of a railway company's act are capable of two interpretations, but the general intent of the legislature is complete indemnification to the party whose land is taken by the company, the court will incline to that construction of the words which will make them consistent with the general intent. *In re London and North Western Railway Company, Ex parte Eton College*, 20 Law J. (N. S.) Chanc. 1.

**RAILWAY COMPANY.**—1. *Calls, jurisdiction of equity to restrain—Shareholders—Preference—Parties—Pleading.*—Under an act of parliament the capital of a railway was converted into shares of the nominal value of 27*l.* 10*s.*, 22*l.*, and 31*l.*, upon which unequal sums were due, and upon which profits were payable in proportion to the money actually paid. A bill was filed by a holder of shares of 31*l.* on behalf of himself and the other holders of such shares, alleging that the directors had formed a scheme to conduct the affairs of the company without regard to the general benefit of the shareholders, but for the benefit of the holders of shares of 27*l.* 10*s.* and 22*l.*; and that in furtherance of such design they had made a call of 10*l.* on the holders of shares of 31*l.*, and that they had done various other acts stated in the bill to intimidate and induce the shareholders to consent to terms which would give an advantage to the holders of shares of 27*l.* 10*s.* and 22*l.* It was also alleged that the call was not required for the works which the company had power to make, and it prayed for an inquiry to ascertain how much of the 10*l.* was required for the purposes of the company, and for an injunction to restrain proceedings to enforce payment of more of such calls than should be found necessary. The bill also alleged that the plaintiff and other holders of 31*l.* shares had not paid the call, but that some had: Held, upon a demurrer by the company for want of equity and for want of parties, that, as the bill contemplated a continuance of the company, the court could not entertain jurisdiction and assume to interfere in the internal management of the company, and that the plaintiff was not entitled to relief on this bill: Held, also, that the bill was defective for want of parties, as the plaintiff sued as well for shareholders who had paid as for those who had not paid, and also because the bill did not allege that the holders of other shares were fully represented by the defendants, and the demurrer was allowed, and leave to amend the bill refused. The clauses in a railway act upon which a plaintiff intends to rely should be stated in the bill; and, if omitted in the bill, cannot be referred to upon demurrer, although the act is a public one. *Bailey v. The Birkenhead, Lancashire and Cheshire Junction Railway Company*, 19 Law J. (N. S.) Chanc. 377.

2. *Payment out of court of small sums.*—A railway company took some land which had been settled on A. for life with remainder to his issue, and the purchase money was paid into court. An agreement

for investing this sum, with the exception of 30*l.*, in the purchase of other land, was approved of by the Master. On a petition for carrying out the agreement it was ordered, that the 30*l.* should be paid to A., he undertaking to lay it out in lasting improvements. *Ex parte Barrett*, 19 Law J. (N. S.) Chanc. 415.

**SEPARATE ACCOUNT.**—*Carrying over*—*Practice.*—Observations on the effect of carrying over funds to separate accounts in the Accountant-General's books, and on the importance of affixing appropriate headings thereto. When a fund is carried over to a particular separate account, it is released from the general questions in the cause, and becomes marked as being subject only to the questions arising upon the particular matter referred to in the heading of the account. *In re Jervoise*, 12 B. 209.

**SERVANT.** See **WILL**.

**SETTLEMENT.**—*Charge, when raisable*—*Tenant for life and remainder-man.*—Estates were limited by settlement to the use of trustees for a term upon trust, in the first place, by cutting, &c., and converting into money certain timber, or by demising, mortgaging or selling the settled estates, or by any other reasonable means, to raise certain charges; and, subject to the term, the estates were limited to the use of several successive tenants for life, without impeachment of waste, with divers remainders over in tail. The trustees proposed to raise the charges by mortgage of the estates without resorting to the timber: Held, on demurrer to bill filed by remainder-man to restrain the trustees from so doing, that the course about to be adopted by them was right; that as between the tenant for life and the remainder-man, the former was to keep down the interest and the corpus of the estate to bear the charges; and that the tenant for life, being unimpeachable for waste, was entitled, as part of the profits of the estate, to the timber which he had a right to cut. *Marker v. Keke-wick*, 19 Law J. (N. S.) Chanc. 492.

**SHAREHOLDERS.** See **RAILWAY COMPANY**.

**SHARES.** See **COMPANY**.

**SHIP AND SHIPPING.**—*Fraud under Ship Registry Act and Foreign Enlistment Act*—*Corporation*—*Indictment.*—During the rebellion in Sicily two foreigners were sent to England by the usurping government to purchase a vessel from the defendants. The vessel was registered in the name of the company, and a bill of sale was then executed to two persons alleged to be trustees for the foreigners. The plaintiff, upon being restored to his government, filed a bill to restrain the company from parting with the vessel, upon the ground that the purchase money was taken from his royal treasury. The bill alleged that the company had entered into a scheme with the two foreigners for the purpose of evading the provisions of the Ship Registry Act. The company demurred, on the ground that by answering the bill they would expose themselves to pains and penalties under the Ship Registry Act and to an indictment under the

Foreign Enlistment Act. Demurrer overruled: Held, that a corporation cannot be indicted under the Foreign Enlistment Act. *King of the Two Sicilies v. Peninsular and Oriental Steam Packet Company*, 19 Law J. (N. S.) Chanc. 488.

TENANT FOR LIFE. See COSTS. SETTLEMENT.

TRUST.—*Savings banks—Deposits.*—A brother deposited various sums of money in a savings bank in the name of his sister and himself as a trustee. He kept the depositor's book in his own possession, and drew out small sums as he required them, and made other deposits; he never in his lifetime communicated the circumstances to any one, and died without having made any declaration of trust respecting the money deposited. Upon a claim by a sister, held, that no trust was created, the probable intentions for opening the account being to evade the provisions of the Savings Bank Act, limiting the amount to be deposited in one name. *Field v. Lonsdale*, 19 Law J. (N. S.) Chanc. 560.

TRUST MONIES. See PURCHASE.

WAIVER. See BUILDING.

WILL.—1. A testator by his will devised his residuary real estates to trustees in trust for certain tenants for life, with remainder to D. F. for life, with remainder in trust for the sons of D. F. as tenants in common in tail male, with cross remainders and remainders over; and he directed his residuary personal estate to be laid out in the purchase of land to be settled to the same uses. By a testamentary paper of the same date as the will, and headed "Memorandum, alias directions to my executors," he directed, as to his residuary personal estate, the executors should apply for an estate of an uncle of the testator as an investment for the use and behoof of D. F., and if not attainable, to inquire if any part of a certain other estate was to be disposed of. Neither of the specified properties could be obtained on fair terms as an investment: Held, that D. F. did not take further interest under the codicil than under the will, and that the testator thereby either meant to express merely a recommendation to his trustees as to the mode of laying out his residuary personalty, or expressed no intention on which the court could act. *Fitch v. Friend*, 2 De G. & S. 404.

2. *Construction.*—Testator devised certain tithes to his nephews D. and W. for their lives successively, and after the expiration thereof to the several provisions and uses therein expressed and contained of and concerning his real estates, and he devised all his real estates of what nature or kind soever and wheresoever situate, subject to the payment of his debts, &c., in aid of his personal estate, to his niece and her sons in strict settlement, with remainders to his nephew W. and his sons, and to two other persons and their sons in like manner, with remainder to another in fee. The niece married, and had a son after the date of the will, and the testator by a codicil devised all his real estates, of what nature or kind soever, to that son for life, with

limitations by way of remainder to his first and other sons in tail male; and on failure of such issue, he devised all his said real estates in the manner mentioned in his will, and declared that the devises therein-before made should take effect in precedence to the devises of his real estates contained in his will: Held, that the words in the codicil did include them, and consequently that the estates for life in the tithes limited to the testator's nephews D. and W. by the will were postponed to the limitations in the codicil to the son of the testator's niece and his sons. *Evans v. Evans*, 17 Sim. 86.

3. *Construction—Bequest to all the children of testator's sons—Distribution.*—A testator bequeathed the residue of personal property to trustees, upon trust to apply the dividends and income of it in the maintenance and education of the children of his two sons until they severally attained twenty-one years of age; and when each grandchild attained that age, to raise and pay 2000*l.* to each; and when all the grandchildren attained that age, to pay the surplus of the said residuary estate to them as tenants in common, each grandchild upon the age of twenty-one years to take a vested interest: Held, upon bill filed by all the children of one of the sons living at the death of the testator, when the youngest of them attained twenty-one (the other son being then a bachelor), that the plaintiffs were not entitled to a division of the trust funds in exclusion of any other children who might be born of either of the sons, but that the plaintiffs were entitled to the whole of the income, and would be entitled to the principal if no other such child should be born and attain the age of twenty-one years. *Mainwaring v. Beevor*, 19 L. J. (N. S.) Chanc. 397.

4. *Construction—Improvement by investment.*—A. B. bound himself to pay 16,000*l.* on the death of the survivor of himself and wife on certain trusts, under which, on a contingency, the amount was to revert to himself. A. B. by his will gave the 16,000*l.*, if it should revert, to trustees, on trust to pay thereout 14,000*l.* to C., and three legacies of 500*l.* each to charities, and the remaining sum of 500*l.* to the Foundling Hospital. His wife survived him nine years, and the sum of 16,000*l.* was invested in 25,702*l.* 3 per cents. In 1848 the contingency happened, when the fund reverted and amounted to considerably more than 16,000*l.*: Held, that the legatees were entitled to money legacies only, and not to the whole fund. *Loscombe v. Wintringham*, 12 Beav. 46.

5. *Construction—Legacy—Servant—Domestic establishment.*—The earl of A. by his will gave to each person as servant in his domestic establishment at the time of his death a year's wages. The earl of A. lived at E. castle; adjoining to the castle was a garden inclosed by a wall, which was cultivated under the direction of O. as head gardener. O. lived in a garden-house situated in the garden, the domestic work of which was performed by the earl's servants, who came there from the castle: Held, that O. was entitled to a legacy under the above clause. In this case the garden-house had been pulled down shortly before the earl's death, and a new house

was in the course of erection at his death, and during this period O. lived some distance from the castle. It was, however, the intention of the earl that on the completion of the new house O. should remove to it: Held, that O.'s absence was only of a temporary and provisional nature, and did not interfere with his right to the legacy. In this case the circumstance that O. was hired at weekly wages (the hiring not being a yearly one) did not interfere with his right to the legacy. *Ogle v. Morgan*, 19 Law J. (N. S.) Chanc. 531.

6. *Construction—Misdescription of bequest.*—A testator bequeathed to his sister P. "an annuity of 21*l.* a year, which I purchased of J. G." At the date of his will and the time of his death the testator had no annuity of 21*l.* a year, but he had an annuity of 46*l.* a year, which he purchased of J. G. for 300*l.*, and he had insured the life of J. G. for that amount at a yearly premium of 25*l.*, and he had entered this annuity in his books as "300*l.* lent to J. G. at 7*l.* per cent. 21*l.*; 25*l.* premium on policy of assurance for 300*l.*:" Held, that under the form of the bequest P. was entitled to the entire annuity of 46*l.* Where the thing intended to be given is sufficiently indicated, an additional erroneous description of the value of the subject-matter will not vitiate the gift. *Purchase v. Shallis*, 19 Law J. (N. S.) Chanc. 518.

7. *Construction—Next of kin and legal personal representatives—Joint tenants.*—A testatrix having three daughters gave one-third to each for life with remainder to their children respectively, with cross-remainders between them, with an ultimate limitation to her own "next of kin and legal personal representatives:" Held, that the class of next of kin was to be ascertained at the death of the testatrix, and that they took as joint tenants. *Baker v. Gibson*, 12 B. 101.

8. *Construction—Power—Non-execution—Objects.*—A testatrix under a power charged estates with a sum of money, and directed it to be paid to such of her mother's relations as her husband should by will appoint, and for want of such appointment then to her mother's relatives according to the Statute of Distributions. The husband survived but did not appoint the fund to any relation of his wife's mother: Held, that the next of kin of the mother living at the death of the husband were entitled to the fund, in default of a valid appointment by the husband. *Davidson v. Proctor*, 19 Law J. (N. S.) Chanc. 395.

9. "*Lawful issue*"—"Children"—*Construction.*—"Lawful issue" in a will held upon the context to mean "children," and that to the exclusion of "grandchildren" born prior to the period of distribution. *Edwards v. Edwards*, 12 B. 97.

10. "*Pay and divide*"—*Vested interest—Remoteness.*—Construction of a bequest in the form of a direction to "pay, apply and divide" amongst children "when and as" they should severally attain twenty-six. A testator directed his trustees to pay and apply the interest of his residuary estate to his daughter for life, for the support of herself and issue; and after her decease to "pay, apply and divide the principal" amongst all her children, "when and as

they should attain twenty-six. There was a trust for maintenance during minority, and a power of advancement not so restricted: Held, that the children took immediate vested interests, and that the gift was not too remote. *Harrison v. Grimwood*, 12 Beav. 192.

11. *Vested interest—Income—Thellusson Act—Irish real estate—Plate.*—Residuary personal estate was bequeathed in trust for all the sons and daughters of A. and B. (who were living). The shares to be vested at twenty-one, though not payable or transmissible until the deaths of A. and B. The will contained powers of maintenance: Held, that the sons and daughters on attaining twenty-one acquired vested interests, subject to the rights of future-born children; and that after attaining twenty-one they were entitled, in the lifetime of A. and B., to payment of their shares of the income though not of the capital. The rents of Irish estates were directed to be accumulated, and become part of the personal estate: Held, that although the Thellusson Act did not apply to Irish estates, yet that it applied to the rents as invested from time to time; and that although the rents, which ought to be considered as corpus, might be invested for more than twenty-one years from the testator's death, yet that the income thereof could not. As to the custody of plate left as heirlooms, in the intervals before any person became entitled to the possession. *Ellis v. Maxwell*, 12 Beav. 104.

**WINDING-UP ACTS.**—The court has no jurisdiction to restrain a creditor of a joint-stock company from suing one of the members, on the ground that an order has been made for winding up the affairs of the company. *Lord Londesborough's case*, 17 Sim. 18.

And see COMPANY. JURISDICTION.

**WITNESS.**—*Further examination of.*—After publication of his evidence in chief, a witness in the cause may be again examined as to matters upon which he has not been previously examined. *Cuming v. Bishop*, 19 Law J. (N. S.) Chanc. 401.

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## HOUSE OF LORDS.

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Containing the Cases in 2 House of Lords, part 4.

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**INSURANCE.—Freight—Total loss—Abandonment.**—It is the duty of a master, in case of damage to the ship, to do all that can be reasonably done to repair it, bring home the cargo, and earn the freight. Where, in case of damage to a ship, the master elects to repair it, the mere fact that the expenses of repair ultimately prove to be greater than the value of the ship, will not be sufficient to show that he acted beyond the scope of his authority, or to entitle the owner in an action on a policy on freight to recover as for a total loss. The receipt of freight by the obligee of a bottomry bond is, in law, a receipt of it by the shipowner, whose master has given that bond in discharge of expenses incurred in the necessary repairs of the ship. The owners of a ship insured ship and freight. On leaving Pernambuco in June, 1832, the ship struck on a rock, and put back. After a survey, repairs were begun. They were continued for a long period, and the expense of them much exceeded the value of the ship and freight. The master, not being able to procure money in any other manner, was compelled to borrow on a bottomry bond, charging ship, freight and cargo. On the 30th of December, 1839, the owner in London, on being shown a letter addressed to the agents of the lenders on bottomry, in which the great expenses of the repairs were stated, gave notice of abandonment to the underwriters on ship and on freight. The ship arrived, and the freight was duly paid to the holders of the bottomry bond, under an order of the Court of Admiralty. The shipowner sued the underwriters on freight, as for a total loss. The jury found, on a special verdict, that the plaintiff had acted *bonâ fide* without laches, and as a prudent owner of the ship and freight, if uninsured, would act: Held, that in this case, which was one of constructive total loss, the master might have abandoned at Pernambuco, but that having there elected to repair, he must be treated for that purpose as the agent of the owner, whose acts bound the owner: Held, also, that as the special verdict did not find that the owner, if on the spot, would not have repaired the ship, the court could not infer that he would not have done so. A partial loss of freight may be recovered on a declaration claiming a total loss. *Benson v. Chapman*, 2 C. & F. 697.

**JOINT-STOCK COMPANIES WINDING-UP ACT.—1.**

*Provisional Committee.*—If a person whose name is on the provisional committee of a joint-stock company, provisionally registered, “accept” shares in the company, although he does not pay the deposits, he is a contributory within the Winding-up Acts. U.’s name was on the list of the provisional committee contained in a published prospectus of a railway company, provisionally registered, and in answer to a letter from the secretary, informing him that the committee of management had apportioned one hundred shares in the company to each provisional committee-man, and desiring to be informed whether he would take them, he wrote a letter, saying, “I accept the one hundred shares allotted me.” The secretary afterwards sent him a letter of allotment “not transferable,” stating that the committee of management had allotted to him one hundred shares, and requesting him to pay the deposits thereon into one of the company’s banks, on or before a certain day, “or the allotment would be null and void.” U. paid no deposits, and did no other act in connection with the company. The undertaking, having failed for want of capital, was abandoned: Held, that the first two letters formed a complete contract, exclusive of the third; and that U. was a contributory within the Winding-up Acts 1848 and 1849. *Hutton v. Upfill*, 2 C. & F. 674.

2. *Same — Contributory.*—The mere fact of a person being a member of the provisional committee of a joint-stock company does not make him liable as a “contributory” within the Winding-up Acts. C. consented to have his name inserted in the list of provisional committee-men of a proposed railway company, which was provisionally registered, and the name was accordingly inserted and advertised. He did not accept or apply for shares, or attend any meeting of the committee. The undertaking was afterwards abandoned: Held, that C. incurred no liability to contribute towards payment of the debts of the company, and was not a “contributory” within the Winding-up Acts 1848 and 1849. *Norris v. Cottle*, 2 C. & F. 647.

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## ECCLESIASTICAL.

Church and Clergy Cases, vol. 1, part 2.

**ARTICLES OF THE CHURCH OF ENGLAND.**—*What latitude allowed in the interpretation of—Right of private judgment.*—If the Articles of the Church of England admit in any case of different interpretations, any sense of which the words fairly admit, so long as it be not repugnant to what the Church has elsewhere allowed or required, may be allowed. If such Articles are silent or ambiguously expressed upon any particular doctrine, it may be supposed that such doctrine was intended to be left to private judgment; and, upon such doctrines, all ministers of the Church, having duly subscribed the Articles, and taking Holy Scripture for their guide, are at liberty to exercise their private judgment without offence or censure. Mode in which the true meaning of devotional expressions, involving assertions, in the Church services, should be ascertained. *Gorham v. Bishop of Exeter*, 1 Ch. & Cl. C. 266.

**BAPTISM.**—*Baptismal regeneration.—Doctrine of the Church of England as to Gorham v. Bishop of Exeter.*—A clergyman, duly presented, in his examination by the bishop, previous to institution, stated that he did not hold the doctrine that every infant is absolutely and unconditionally regenerated by the Holy Spirit in and by baptism duly administered. The bishop, who had thereupon refused to institute by reason of the unsoundness in doctrine of the presentee, held to have been justified in such refusal. *Gorham v. Bishop of Exeter*, 1 Ch. & Cl. C. 232.

**CHAPEL.**—*Faculty for taking down, removing and rebuilding.*—The ecclesiastical court has power to grant a faculty for taking down, removing and rebuilding a chapel, and will grant it if the circumstances of the case appear to render such a course desirable. The wishes of the inhabitants and the opinion of the bishop will be of primary importance. A clause will be inserted to preserve the site of the old church from desecration. *Clayton v. Dean*, 1 Ch. & Cl. C. 207.

**DILAPIDATIONS.**—1. The executors of a deceased incumbent may maintain an action against the executors of his predecessor for dilapidations which occurred during the incumbency of the latter. The executors of the last incumbent are chargeable with the whole dilapidations, in whose time soever they have accrued, and the new incumbent need go no further back for his remedy. *Bunbury v. Hewson*, 1 Ch. & Cl. C. 192.

2. *On a perpetual curacy.*—A perpetual curate, or his representatives, are liable to an action for dilapidations, at the suit of his successor, in the same manner as in the case of other beneficed ecclesiastics. *Mason v. Lambert*, 1 Ch. & Cl. C. 167.

**EXAMINATION OF CLERGYMAN BY BISHOP BEFORE INSTITUTION.**—*Duplex querelâ.*—A clergyman, duly presented, and tendering his presentation on November 8th, 1847, was informed by the bishop that he should examine him before institution, and December 17th was subsequently fixed by the bishop as the day on which the examination should begin. The clerk attended on that day, but under protest, the twenty-eight days allowed by canon 95 for the bishop to inquire into the qualities and sufficiency of the clerk having expired. After examination, the clerk was rejected, by reason of unsoundness of doctrine: Held, that the clerk having, though under protest, submitted to the examination, and not availed himself of the canon at the expiration of the twenty-eight days, and then called upon the bishop to show cause why he did not institute him, could not raise the objection at a subsequent time. *Gorham v. Bishop of Exeter*, 1 Ch. & Cl. C. 221.

**FEES IN NEW CHURCHES AND CHAPELS.**—Where a district chapelry had been formed out of an old parish under the Church Building Acts, it had been arranged that two-thirds of the fees for marriages, churchings, baptisms, &c., should, during the life of the incumbent of the old parish, belong and be paid to him, and one-third to the minister of the chapelry, no duty is thereby imposed upon the latter to receive such fees for the purpose of paying them over to the former. *King v. Alston*, 1 Ch. & Cl. C. 179.

**LEASES OF TITHES.**—Lessees of tithes are enabled by the Tithe Commutation Acts to surrender their leases, but the tithe not being absolutely extinguished, the covenant of an unsurrendered lease remains in force, and is not determined merely by a commutation having taken place. *Tasker v. Bullman*, 1 Ch. & Cl. C. 190.

**LECTURER.**—*Authority of bishop*—*Clergyman officiating without licence of the bishop*—*Public officiating.*—The warden of Sackville College, in which there was an unconsecrated building called “The Chapel,” where residents and servants of the college attended, was held to have committed an ecclesiastical offence by officiating and administering the sacraments in such chapel after being inhibited by the bishop, this being a public officiating, and requiring the bishop’s licence. *Freeland v. Neale*, 1 Ch. & Cl. C. 159.

**SEXTON.**—*Right of appointment, in whom vested.*—In the absence of any custom proved, the presumption of law as to the proper party to appoint a sexton, is to be derived from the duties which the sexton in the particular case has to perform; so that the right will be in the incumbent or in the churchwardens, or in the incumbent and churchwardens jointly, according as the duties of the sexton are connected with either one or both of those parties. It will

never be in the inhabitants, except by custom. *Cansfield v. Blenkinsop*, 1 Ch. & Cl. C. 217.

**STOPPING UP PATHS IN CHURCHYARDS.**—The notice, which by the statute 59 Geo. 3, c. 134, is directed to be given after any path in a churchyard has been stopped up by order of the Church Building Commissioners, must notwithstanding be given before the order, and if not given until afterwards, the order will be bad. *Reg. v. Arkwright*, 1 Ch. & Cl. C. 186.

**TITHE.**—1. *When rectorial or vicarial.*—The title of a vicar to his tithe depends upon endowment, either actually proved or inferred from prescription or usage; in the absence of proof, from which the prescription of the tithes of peas or beans by the vicar could be inferred, it was held that these tithes were rectorial and not vicarial. Nature of the proof required to establish a title to such tithes in the vicar. *Att.-Gen. v. Ward*, 1 Ch. & Cl. C. 164.

2. *Decision of commissioners as to modus.*—The time of three months allowed by the Tithe Commutation Act as to the time within which a party dissatisfied with the award of the commissioner may bring an action, if it has once begun to run, is not affected by the death of the incumbent and consequent vacancy of the living. *Homfray v. Scroope*, 1 Ch. & Cl. C. 195.

**WASTE.**—*Dilapidations — Opening and using gravel pits.*—The executors of a deceased rector held not liable in an action for dilapidations by reason of such rector having pulled down a barn belonging to the rectory, and erected another on a more convenient site, without obtaining a faculty from the bishop for that purpose. To constitute waste, there must be either a diminishing the value of the estate, or an increasing the burthen upon it, or an impairing the evidence of title,—much more must one of these three requisites exist in an action for dilapidations. Gravel pits had been opened on rectory land, and gravel taken by the surveyor of highways, and the ground had not been sloped down as required by statute. Neither the taking of such gravel by the surveyor, nor the neglecting to compel him to slope down, is waste by the rector; but the defendants were held liable in respect of so much of the gravel as had been dug out and sold generally by the late rector, although the pits had been opened prior to his incumbency, the evidence showing that no gravel had been dug and sold generally previously. *Huntley v. Russell*, 1 Ch. & Cl. C. 200.

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## Digest of Cases.

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### COMMON LAW.

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Comprising the Common Law Cases (not previously inserted) in the following Reports :—

12 Queen's Bench, part 4.	20 Law Journal (N. S.), parts 2, 3 and 4.
1 Queen's Bench Practice, part 5.	6 Railway and Canal Cases, part 2.
4 Exchequer, part 5.	6 Moore, part 1.

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**ANNUITY DEED.**—It is no ground for setting aside an annuity deed under the 53 Geo. 3, c. 141, s. 16, that upon the execution of the deed, and immediately after the consideration money had been handed over to the grantor by his agent J. G., who acted also as the agent of the grantee, the grantor voluntarily returned to J. G. a part of such consideration money, in payment of a debt due from the grantor to J. G., and of the costs and expenses relating to the annuity transaction. *Aberdein v. Jerdin*, 20 Law J. (N. S.) Q. B. 111.

**ARBITRATOR.**—*Power of, over his own fees.*—An arbitrator or umpire has no power to fix his own fee in the award, and to make the taking up of the award conditional upon the payment of the fee, unless the admission specifically give him that power. Certain matters in difference between A. B. and C. D. having been referred to two arbitrators, with power to appoint an umpire, where, by the terms of the submission, the costs of the submission and award were to be in the discretion of the arbitrators or umpire, who by their award might direct by and to whom the same should be paid, with power also to make the submission a rule of court (which was done). An umpire was appointed who made an award, and thereby found a certain sum to be due from A. B. to C. D., and he awarded and directed all the costs (specifying the sum) of the submission and award, including therein the costs of taking up the award, to be paid by the party taking up the award, to be paid on a specified day by A. B. The fees of the arbitrators and umpire were included in the costs: *Semble*, that the award was bad, and C. D. having paid the amount to take up the award, that he might recover back the amount beyond what was reasonably due in an action for money had and received. *Coombs, in re*, 4 Exch. 839.



**ARBITRATION.**—By an agreement referring certain disputes to two arbitrators, and, upon failure to make an award within a specified time, then to an umpire, to be appointed by them; the costs of the reference, award and umpirage were to be in the discretion of the arbitrators and umpire respectively. By agreement between the parties, the umpires sat with the arbitrators up to the time when their power to make the award expired, and afterwards the arbitrators sat with the umpire, and being scientific persons acted as his assessors and assisted him in making his umpirage. The umpire made his award, and gave notice that it might be taken up “on payment of the costs of umpirage and award,” and specified the amount, including charges for the attendance of the arbitrators. E. paid the fees and took up the award. The award directed that each party should pay their own costs of the reference, and that “the costs of the said umpirage, and of this my award,” should be paid by A. to E.: Held, on motion to review the taxation, that the charges of the attendance of the arbitrators were part of the costs of the umpirage, which A. by the terms of the award was to pay. *Ellison v. Ackroyd*, 1 Q. B. P. 806.

**ATTORNEY.**—1. *Partnership—Limitations, statute of.*—In 1832 A. employed B. and C., then in partnership as attornies, to lay out 500*l.* on mortgage. It was invested accordingly on a mortgage to D. D. subsequently sold the property, subject to the mortgage, and the purchaser shortly afterwards paid the 500*l.* to C., who, however, did not inform either B. his partner, or A., of such receipt, and again lent the purchaser 300*l.*, and continued to receive the interest thereon. The partnership was dissolved in 1838; but both before and after the dissolution, and after the death of A., which took place in 1840, interest was paid as upon a mortgage of 500*l.* to A. and his representatives up to 1848 by C. In 1846 the 300*l.* was paid to C., and the mortgage deed was given up by C., but no reconveyance was ever executed. Neither A. nor his representatives had any knowledge of these facts until 1848. Entries had been made by C. in the partnership books of the receipts and payments, but B. had no knowledge of the transactions subsequent to the original advance of the 500*l.*: Held, in an action by the executors of A. against B. and C., that the Statute of Limitations was a bar to the action. And, *semble*, that B. was not liable for these acts of C., as they were not within the scope of his partnership authority. *Sims v. Brutton*, 20 Law J. (N. S.) Exch. 41.

2. *Alteration of name of, on the roll.*—On the application of an attorney to be allowed to substitute the name of J. Heaton D. on the roll of attornies in the place of J. D., the court directed the master to enter on the roll, opposite the name of J. D., a memorandum, that by rule of this court J. D. should be known by the name of J. Heaton D., and that the master should be at liberty to make such indorsement of such alteration of the name on the admission of the applicant. *Dearden, in re*, 20 Law J. (N. S.) Exch. 80.

**AWARD.**—1. *Rule for payment of money under 1 & 2 Vict. c. 110,*

s. 18.—Where a cause and all matters in difference are referred, an award, reciting the order of reference, and purporting to be made “*de præmissis*,” is final, although it does not in express terms notice a matter brought before the arbitrator. *Semble*, that the 18th section of the 1 & 2 Vict. c. 110, has not given the courts power to make orders in cases in which it was not their practice to make any before the passing of that act; but has only given orders for paying money made in their ordinary practice the effect of judgments. But even if they had the power of making such orders, they will not exercise it except in cases where they would grant an attachment. *Creswick v. Harrison*, 1 Q. B. Pr. 721.

2. When a cause was referred with all matters in difference at nisi prius, and the order of reference empowered the Court of Queen’s Bench, in the event of any application being made on the subject of the award, to refer the matter back to the arbitrator for further consideration: Held, that the application to refer back must be made within the same time as an application to set aside an award. *Doe d. Banks v. Holmes*, 12 Q. B. 951.

BAIL.—*Deposit in lieu of—Payment to plaintiff.*—Where a defendant is arrested under 1 & 2 Vict. c. 110, and is released on depositing with the sheriff the amount indorsed upon the writ, with 10*l.* for costs, which sums are afterwards paid into court, the plaintiff is entitled to have the money paid out of court to him (subject to taxation) if the defendant neglects to pay an additional 10*l.* into court pursuant to 7 & 8 Geo. 4, c. 71, s. 2. *Nyssen v. Ruysenaers*, 20 Law J. (N. S.) Exch. 33.

BANKRUPT.—1. The plaintiff recovered judgment against the defendant in the Court of Exchequer. Afterwards, on the 1st of January, the defendant, being in custody at the suit of W., petitioned the Insolvent Court, and inserted in his schedule the plaintiff’s judgment debt and costs. On the 12th the plaintiff lodged a detainer against the defendant upon the judgment. On the 25th he withdrew the detainer, and petitioned the Court of Bankruptcy for adjudication of bankruptcy against the defendant, who was on the same day adjudged bankrupt. On the following day he was discharged by the Insolvent Court. On the 23rd of July the Court of Bankruptcy granted a certificate, under the 257th section of the 12 & 13 Vict. c. 106, certifying that the plaintiff was a judgment creditor of 71*l.* 7*s.*, which was the amount of the judgment minus the costs. The defendant having been taken in execution upon a ca. sa. issued out of this court upon that certificate: Held, upon motion for his discharge, first, that the defendant’s discharge from arrest upon the judgment did not preclude the plaintiff from arresting him upon the certificate; secondly, that the defendant was not protected from such arrest by the 1 & 2 Vict. c. 110, s. 90. Whether a judgment creditor, who has taken his debtor in execution, is a good petitioning creditor to support a commission of bankruptcy, *quære*. But whether he is not, held, thirdly, that where no steps have been taken to supersede the

proceedings in bankruptcy, the commissioner's certificate, under sect. 251, must be treated as valid; fourthly, that the 257th section of the 12 & 13 Vict. c. 106, applies to creditors who have obtained judgment before proof as well as to those who have not; fifthly, that the 40th section of 1 & 2 Vict. c. 110, keeps alive the proceedings in the Insolvent Court only for the purpose of reaching the future estate of a bankrupt who obtains his certificate, but has no operation when the bankrupt does not obtain his certificate; sixthly, that the 12 & 13 Vict. c. 106, transfers all questions as to the bankrupt's discharge to the Court of Bankruptcy. *Walker v Edmonson*, 1 Q. B. Pr. 772.

2. *Execution—Seizure and sale*—12 & 13 Vict. c. 106, ss. 133, 184.—The seizure of a trader's goods under an execution in an action commenced adversely, gives the creditor no priority in case such trader is made bankrupt upon a petition for adjudication filed before the sale of the goods, whether the act of bankruptcy is before or after the seizure. *Hutton v. Cooper*, 20 Law J. (N. S.) Exch. 123.

3. *Certificate of conformity*.—A writ of execution against a bankrupt, granted upon a certificate under the 12 & 13 Vict. c. 106, s. 257, pending the suspension of the certificate of conformity, cannot be enforced after the certificate of conformity has come into operation. *Everard George, in re*, 20 Law J. (N. S.) Exch. 125.

**BANKRUPTCY LAW AMENDMENT ACT.**—*Concealment of goods*.—A secreting by a bankrupt of his goods, with intent to cheat his creditors, is a concealment sufficient to avoid his certificate, within the 38th section of the Bankruptcy Law Amendment Act, 5 & 6 Vict. c. 122, although a full disclosure of the concealment is made to the commissioners in bankruptcy before the bankrupt's last examination. *Courtioron v. Meunier*, 20 Law J. (N. S.) Exch. 104.

**BILL OF EXCHANGE.**—*Payment to drawer*.—To an action by the indorsee of a bill of exchange against the acceptor, the defendant pleaded that I. H., the drawer, indorsed the bill to the plaintiff without value or consideration, and that the plaintiff always held it without value or consideration, and that after the bill became due, I. H. accepted certain script certificates from the defendant in full satisfaction and discharge of the bill. The plaintiff replied that the bill was indorsed for value and consideration; and upon this issue the defendant had a verdict: Held, that the plaintiff was entitled to judgment non obstante veredicto. *Milnes v. Dawson*, 20 Law J. (N. S.) Exch. 81.

See COMPANY.

**CLAIMS.**—*Evidence*.—At the hearing of a claim a plaintiff's affidavit cannot be received as evidence of a disputed fact. A defendant's affidavit on a claim is entitled to the same weight as a defendant's answer in a cause heard on bill, answer, replication and depositions on interrogatories. It is competent for the court to decide claims, where there are disputed facts and a conflict of evidence, on affidavit evidence alone. The difference between affidavit

evidence and depositions taken on interrogatories is not so great as to induce the court, on the hearing of a claim involving questions of fact alone to direct a bill to be filed. Where a claim in which there are disputed facts is brought on for hearing with defective evidence, it is competent in the court to direct it to stand over, with liberty for the plaintiff to supply the defect. *Smith v. Constant*, 20 Law J. (N.S.) Chanc. 126.

**COMPANY.—Winding-up Act.**—1. E. Walstab had taken shares in the above company, and had paid the deposit, but had since recovered back the deposit in an action at law against one of the directors: Held, that she was not liable as a contributory under the Winding-up Act. *Direct Birmingham, Oxford, Reading and Brighton Railway Company, in re Walstab, ex parte*, 20 Law J. (N.S.) Chanc. 58.

2. *Bill of exchange—Acceptance on behalf of company*—7 & 8 Vict. c. 110, s. 45.—A bill of exchange drawn upon a completely registered joint-stock company by its corporate name, was accepted as follows:—"Accepted, J. B. and E. N., Directors of the C. Company, appointed to accept this bill;" J. B. and E. N. were, in fact, directors of the company. The corporate seal, having the name of the company inscribed, was also affixed to the bill, and it was countersigned by the secretary: Held, that the bill of exchange was sufficiently expressed to be accepted by J. B. and E. N. on behalf of the company within 7 & 8 Vict. c. 110, s. 45. *Halford v. Cameron's Coalbrook Steam Coal and Swansea and Loughor Railway Company*, 20 Law J. (N.S.) Q. B. 160.

3. *Bill of exchange—Bill drawn on several, accepted by one.*—A person who accepts a bill addressed to himself and others is individually liable. It is sufficient evidence to prove a person to be a member of a trading company, that he and others had agreed to form a company, and that business had been carried on upon the footing of the agreement. Where a bill was addressed to a mining company and accepted by the defendant as manager, and it was shown that he and three others had agreed to form the company, and that the mine had been worked on the footing of that agreement: Held, that the defendant was individually liable on the bill as a member of the company. The case of *Vice v. Lady Anson*, 7 B. & C. 409; S. C. 6 Law J. Report, K. B. 24, commented upon. *Owen v. Van Uster*, 20 Law J. (N.S.) C. B. 61.

4. *Allottee.*—In an action by an allottee of shares in a projected railway company, which had been abandoned, the plaintiff gave secondary evidence of the letter of allotment, but gave no evidence of any letter of application for shares, nor did it appear that there had been any, though it was proved what was the usual form of such letters. The letter of allotment was headed "Not transferable." He then produced the banker's receipt, with a 20s. stamp on it; and then gave in evidence a letter from him to the defendant, stating that he had not received his shares, and requesting a return of his deposit, and an answer, "that every effort was being made to go to parliament

this session." Nothing more took place: Held, on a bill of exceptions, that it was not necessary that the plaintiff should have proved a letter of application; for if no letter of application was sent there was no written contract, because the letter of allotment would be the first writing, and that was only an assent to an offer by parol; that, if a letter of application was sent, there was a variance between the two documents, the words "not transferable" in the letter of allotment imposing a new term. Secondly, that the stamp was sufficient within the 10th section of 55 Geo. 3, c. 184. Thirdly, that there was sufficient evidence of an abandonment of the scheme. *Chaplin v. Clark*, 6 B. & L. Exch. 193.

5. *Shareholder*.—The executors of a shareholder are not liable in an action for calls in the statutory form under the Companies Clauses Consolidation Act, when the call is made in the lifetime of the testator. *Birkenhead, Lancashire and Cheshire Junction Railway Company v. Cotesworth*, 6 B. & L. Exch. 211.

6. *Calls payable by instalments*.—An action of debt will not lie for a call payable by instalments until all of the instalments are due. *Semble*, that a call payable by instalments is bad. *Ambergate, Nottingham, Boston and East Junction Railway Company v. Coulthard*, 6 B. & L. Exch. 218.

7. *Winding-up Act—Contributory*.—A provisional committee-man who has accepted shares in a company is liable as a contributory, following the decision in Upfill's case. *Direct Birmingham, Oxford, Reading and Brighton Railway Company, In re, Sichel, Ex parte*, 26 Law T. (N. S) Chanc. 129.

8. *Winding-up Acts*.—A person allowing his name to be placed on the list of the provisional committee of a railway company in the course of being formed, without more, does not thereby authorize his companions or their officers to pledge his credit with strangers, and he is not a contributory within the meaning of the acts. The mere fact of payment of a sum of money by a provisional committee-man to avoid trouble and contention, is not sufficient of itself to raise either a legal or equitable liability. *Norris v. Cottle*, 6 B. & L. Chanc. 317.

9. *Joint stock banking*.—If an instrument contains distinct engagements, by which a party binds himself to do certain acts, some of which are legal and some illegal at common law, the performance of those which are legal may be enforced, though those which are illegal cannot. By a deed of settlement, a joint stock banking company, called "The Bank of Australia," was established as a bank of issue and deposit at Sydney, in New South Wales. The deed contained clauses conferring powers upon the directors "for the better management of the concerns of the said company, &c.," whereby it was declared that they shall have and be expressly invested with "full power and authority to superintend, order, conduct, regulate and manage all and singular the affairs and business of the said company, to the best of their discretion and judgment, under and subject to the provisions thereafter contained." Such board of directors were further empowered to "devise and make such provisions, rules, orders

and regulations, touching the government, carrying on and management of the affairs of the said company, the same not being repugnant to the general rules and regulations therein contained, as they should think expedient. In the year 1843 the Bank of Australia became involved in pecuniary difficulties, whereupon the directors at Sydney applied to the Bank of Australasia for a loan, and borrowed from that bank, at various times, the sum of 154,000*l.*, for which the directors gave their promissory note. Upon the negotiation of this loan the directors of the Bank of Australia entered into an agreement with the Bank of Australasia, whereby they stipulated that the Bank of Australia should cease to be a bank of issue, deposit and discount, and should become a loan company, and that no transfer of shares or stock should be made without the consent of the Bank of Australasia, they also agreed to wind up and get in their capital as a loan company. Payment of the note for 154,000*l.* was refused by the shareholders of the Bank of Australia, on the ground that the stipulations contained in the agreement were ultra vires the directors. On an action brought by the Bank of Australasia on the promissory note, against the chairman of the Bank of Australia, the Supreme Court at New South Wales, at a trial at bar, found for the defendant. Upon appeal: Held, by the Judicial Committee (reversing the verdict and judgment of the Supreme Court), 1st. That the directors of the Bank of Australia had the powers of managing partners in an ordinary banking partnership, and that, amongst these, was the power of borrowing money for the purpose of discharging the existing liabilities of the bank till the assets should be realized, and of discontinuing the bank if they thought such conduct essential to the interests of the shareholders. 2ndly. That the circumstances of the engagements of the directors to repay the loan being accompanied by other stipulations, some of which were ultra vires, did not discharge the bank from liability to repay the loan, as the only effect of those stipulations was that they could not be enforced: Held, also, that the proceedings before the Judicial Committee, from the verdict of the Supreme Court, was in the nature of an appeal, and not a writ of error, and that this court has power under the common law jurisdiction to give subsequent interest upon the judgment debt. Although no power is given by the charter of justice, or the act of parliament creating the Supreme Court at New South Wales, to allow an appeal to the Queen in Council from that court; yet, to prevent a failure of justice, this court will, upon a special petition for that purpose, grant leave to appeal from a judgment of that court. *Bank of Australasia v. Breillat*, 6 Moore, 152.

10. *Railway.—Action for calls—Bankruptcy and certificate—Acceptance by assignees.*—Debt for railway calls. Pleas, secondly, that the defendant was not a holder of the shares, and, thirdly, bankruptcy of the defendant. The defendant, being the holder of shares in a railway company, became bankrupt. No transfer of the shares to the assignees had taken place in the mode pointed out by the Companies Clauses Act, 8 Vict. c. 16, but before the fiat a corre-



spondence took place between the official and the trade assignee, in which the latter sent to the former a statement of the bankrupt's property, comprising in it the value of the shares in question, and estimating the amount that would be necessary to work the fiat and pay dividends, and he subsequently wrote suggesting the propriety of selling the shares. Afterwards, and after the fiat, three calls were made: Held, first, that there was no evidence of the assignees having accepted the shares. Secondly, that the debt was not barred by the certificate, as it was not proveable under the fiat as a debt due in futuro, within sect. 51 of the 6 Geo. 4, c. 16, or as a debt due on a contingency, within sect. 56. *South Staffordshire Railway Company v. Burnside*, 20 Law J. (N. S.) Exch. 120.

11. *Winding-up Act—Contributory*.—A. took shares in a joint-stock company, and paid a deposit and a call, but did not execute the deed of settlement. A further call was made, which A. did not notice. The deed of settlement contained clauses authorizing the directors to declare shares forfeited for non-payment of calls, and for not executing the deed of settlement. The directors declared A.'s shares to be forfeited for non-payment of calls. The company was ordered to be wound up: Held, that A. was not a contributory. *Kollmann's Railway Locomotive and Carriage Improvement Company, In re, Baily, Ex parte*, 20 Law J. (N. S.) Chanc. 145.

See RAILWAY COMPANY.

CONTRACT.—*Railway companies*.—1. In consideration of the S. and B. Railway Company withdrawing their opposition to a bill brought into parliament by the L. and N. W. Railway Company, to enable the latter to take a lease of the undertaking of the S. U. Railways and Canal Company, the three companies entered into an agreement to keep a mutual account of the traffic of the S. and B. Railway and the S. U. Railway lines, and to divide the property between them in certain proportions, and that the L. and N. W. Railway Company should not use the lines to be leased to them so as to compete for any traffic which properly belonged to the S. and B. Railway Company: the opposition was withdrawn and the bill passed: Held, upon demurrer, that such an agreement was not a fraud upon parliament nor inconsistent with the duties which the directors of the several companies owed either to the public or their constituents. By an act of parliament, reciting three previous acts, the L. and N. W. Railway Company were empowered, on the completion of the works of the three railways by the said recited acts authorized to be made so as to be opened for public traffic, or at such earlier period as might be agreed upon, to accept a lease in perpetuity of the undertaking; and it was provided that, upon the completion of the undertaking, the same should be worked by the L. and N. W. Railway Company consistently with the provisions of the act, and the lease to be granted in pursuance thereof, and that the said L. and N. W. Railway Company should have all the powers in relation to every such completed railway as were given to the S. U. Railway Company by the act authorizing the formation thereof. The act then

provided for the computation of the rent to be paid on each of the said railways when completed in succession until the lease should be executed: Held, that, upon the true construction of the act, the relation of landlord and tenant, with its respective benefits and liabilities, arose as and when each line was completed, notwithstanding the lease could not be executed until the whole of the undertaking was completed. An injunction, granted upon motion by the court below restraining the defendants from using the lines leased to the L. and N. W. Railway Company so as to compete with the traffic properly belonging to the plaintiffs' line, was dissolved upon appeal, with liberty to the plaintiffs to bring an action at law for breach of the agreement, the plaintiffs and the defendants mutually undertaking at the same time to keep an account of the traffic on their respective lines. Upon motion by way of appeal to dissolve an injunction granted upon affidavits before answer, the answer subsequently filed was used; the court on dissolving the injunction refused to give the defendants the costs of the appeal motion. *Shrewsbury and Birmingham Railway Company v. The London and North-Western Railway Company, The Shropshire Union Railways and Canal Company, and G. C. Glyn and W. Cowan*, 20 Law J. (N. S.) Chanc. 90.

2. *Contract of sale, when complete.*—Messrs. H. L. & Co., of Montreal, entered into a written contract with Messrs. L. & Co. for the sale of a quantity of red pine timber, then lying above the Rapids, Ottawa River, stated to consist of 1391 pieces, measuring 50,000 feet more or less, to be deliverable at a certain boom at Quebec on or before the 15th of June then next, and to be paid for by the purchasers' promissory notes of ninety days from that date, at the rate of 9½d. per foot measured off; if the quantity turned out more than above stated, the surplus was to be paid for by the purchasers at 9½d. per foot on delivery; and if it fell short, the difference was to be refunded by the sellers. The price of the 50,000 feet at the agreed rate was paid by Messrs. L. & Co. according to the terms of the contract. The timber was not delivered on the day prescribed in the contract of sale, and when it arrived at Quebec, and before it was measured and delivered, the raft was broken up by a storm, whereby the greater part of the timber was dispersed and lost. Messrs. L. & Co. after the storm collected such of the timber as could be saved, paid salvage for it, and applied the timber saved to their own use. In an action brought by Messrs. L. & Co. against Messrs. H. L. & Co. to recover the amount paid on their promissory notes, and for a breach of the contract, and for the difference between the contract price of 9½d. per foot and 10½d. per foot, the market price, when the timber was to have been delivered: Held, by the Judicial Committee, affirming the judgment of the Court of Appeals in Lower Canada,—1. That the action was maintainable. 2. That by the terms of the contract, until the measurement and delivery of the timber was made the sale was not complete, and that the transfer of the property was postponed until the measurement at the delivery; and the risk remained with the sellers. 3. That the taking possession of a part of the timber by

Messrs. L. & Co. after the day mentioned for the delivery thereof in the contract, and not at the place, could not be considered as an acceptance of the whole, nor could it be considered as an admission that the property in the timber passed to them before the storm which broke up the raft. The old French law in force in Lower Canada, grounded on the civil law, is in substance the same as the law of England upon this point. *Logan v. Le Mesurier*, 6 Moore, 116.

3. *Construction*.—An agreement, dated the 12th of December, between the plaintiff and the defendant, who carried on the business of a puller of wool, stipulated that the defendant should sell to the plaintiff what he might pull up to the 6th of January, "say not less than 100 packs of wool:" Held (dissentiente, Coleridge, J.), that, in the absence of an averment the word "say" had any peculiar meaning, the agreement imported that the defendant should pull and supply to the plaintiff 100 packs as a minimum during the specified period, and that the plaintiff should take any further quantity which should be pulled by the defendant during the period. *Leeming v. Snaith*, 20 Law J. (N. S.) Q. B. 164.

4. *Goods sold and delivered—Sale or return*.—Where goods are sold under a contract of "sale or return," they pass to the purchaser, subject to an option in him to return them within a reasonable time, and if he fails to exercise that option within a reasonable time, the price of the goods may be recovered, as upon an absolute sale, in an action for goods sold and delivered. *Moss v. Sweet*, 20 Law J. (N. S.) Q. B. 167.

5. *Condition precedent—Fraud*.—A building contract between A. and B. contained a proviso that the payments thereby agreed to be made by B. should only be due provided the certificate of the surveyor of B. for the time being should first be obtained. A. having sued in indebitatus assumpsit for the balance alleged to be due: Held, that, under the general issue, the absence of the certificate was a good answer to the action, and that the plaintiff was not at liberty to show that it was withheld fraudulently, and in collusion with the defendant. *Milner v. Field*, 20 Law J. (N. S.) Exch. 68.

6. *Evidence—Handwriting—Proof of, by similarity of spelling*.—For the purpose of proving a document in which a word is spelt in a particular manner, ex. gr. Titchborne for Tichborne, to be in the handwriting of a party, other documents not in evidence in the cause, but proved to be in the handwriting of the party, and in which the word is similarly spelt, are admissible in evidence. *Brookes v. Tichborne*, 20 Law J. (N. S.) Exch. 69.

**COSTS.**—1. The plaintiff succeeded at the trial on a single issue, which entitled him to a verdict with nominal damages. The defendant succeeded on all the other issues. On taxation of costs the Master allowed the defendant the costs of the special jury obtained by the plaintiff, on the ground that the plaintiff could not have obtained a special jury if the issue on which he succeeded had been the only one to be tried, and the fees paid to counsel with the briefs, on the ground that they were moderate and such as would have been

allowed, if the issue on which the plaintiff had succeeded had not been to be tried. The court refused to order the Master to review his taxation. *Fazakerley v. Rogerson*, 1 Q. B. P. 747.

2. *Defendant's right to—Criminal information.*—Where, in a criminal information for a libel, the defendant recovers a verdict and judgment, he is entitled to recover from the prosecutor the costs sustained by reason of the information, under the 6 & 7 Vict. c. 96, s. 8, although the only plea upon the record is not guilty, and the judge at the trial certifies, under the 4 & 5 W. & M. c. 18, s. 2, that there was a reasonable cause for exhibiting such information. *Reg. v. Latimer*, 20 Law J. (N. S.) Q. B. 129.

And see COMPANY. PRACTICE, 1. WITNESS.

COUNTY COURT.—1. Where a debt or demand exceeding 20*l.* is sued for in a superior court, and is reduced below that sum by payments, the defendant is entitled to enter a suggestion to deprive the plaintiff of costs, under the County Courts' Act, 9 & 10 Vict. c. 95, s. 129. *Turner v. Barry*, 1 Q. B. P. 744.

2. It is no objection to a warrant upon an order of commitment made by a County Court judge under the 98th section of the 9 & 10 Vict. c. 95, that the warrant was not issued until six months after the date of the order, although it does not appear that any previous warrant has been issued. *O'Neil, ex parte*, 1 Q. B. P. 737.

3. *Right to be appointed clerk of.*—In a court holden under an act cited in Schedule (B) of stat. 9 & 10 Vict. c. 95, A., on 1st of June, 1846, held the office of clerk to a court for the recovery of small debts; but, owing to the state of his health, the duties were performed by his deputy: Held, that such deputy was not entitled to be appointed clerk to the County Court, under sect. 34 of the latter statute, as "performing the duties." In the rule nisi for a quo warranto information it is not enough, under Reg. Hil. 7 & 8 Geo. 4, to state that the party against whom the application is made was not entitled to be appointed to the office, and that the relator was. *Reg. v. Edye*, 12 Q. B. 936.

4. *Certiorari.*—A writ or certiorari was granted by a judge to two defendants to remove a plaint of replevin from a County Court, on an affidavit stating that the rent exceeded 20*l.* (9 & 10 Vict. c. 95, s. 121). No previous application had been made to the County Court judge. At the trial the defendants presented the certiorari, and one of them offered to make the declaration under the 121st sect., stating that the other was unable to make it. They also tendered a bond, conditioned to prove in the superior court that the rent was more than 20*l.* The sureties were not approved by the clerk of the court. A rule nisi for an attachment had been granted against the judge for not receiving and returning the certiorari. The court refused, on the above grounds, to quash the certiorari. The judge of the County Court is bound, before allowing the certiorari, to see that the requirements of the 121st section have been complied with; e. g. that the declaration is made, that the bond is given, and that the names of the sureties

are given and approved by the clerk of the court. *Mungean v. Wheatley*, 20 Law J. (N. S.) Exch. 106, 108.

5. *Appeal from*.—The defendant was a clerk to the plaintiffs under an agreement for a salary of 140*l.* a year, determinable by three months' notice, or on payment of three months' salary. The plaintiffs discovering that the defendant had written letters reflecting on them, and communicating information which he had received in his capacity of clerk, dismissed him without notice or salary. They subsequently sued him in the County Court to recover 30*l.* which he had received to their use. The defendant admitted the receipt of the 30*l.*, but relied as a defence, by way of a set-off, on a claim for 35*l.* for three months' salary, for having been dismissed without notice. The plaintiffs contended that the defendant's conduct justified their dismissing him without notice or salary. The judge ruled, that the plaintiffs were not justified in dismissing him without his salary, and allowed the set-off: Held, on a case stated, that although there were no sufficient grounds for depriving the defendant of his salary, yet, as the dismissal was not a wrongful dismissal, but an event contemplated by the agreement, the three months' salary became on the dismissal a debt to the defendant, and was a proper subject of set-off: Held also, that the court above would not review the judgment of the County Court judge on a question of fact, or, if the judgment given by him were right, consider whether the reasons he assigned for it were valid in law. *Quære*, per Maule, J., whether any appeal will lie from the decision of a County Court, except in cases in which a jury has been summoned to decide on the facts. *East Anglian Railway Company v. Lythgoe*, 20 Law J. (N. S.) C. B. 84.

6. *Certiorari—Money had and received*.—*Semble*, that a certiorari may still issue under 9 & 10 Vict. c. 95, s. 90, to remove a cause from the County Court, notwithstanding 13 & 14 Vict. c. 61, s. 16; but held, that all the material facts relative to the state of the cause should be brought before the judge upon the application for the writ; and therefore, where a certiorari had been obtained without the judge having been informed that the case had already been heard for several days in the County Court, the writ was set aside as having been issued improvidently. *Parker v. Bristol and Exeter Railway Company*, 20 Law J. (N. S.) Exch. 112.

COVENANT.—*Construction of*.—In a deed by which A. assigned to B. for a term of years an exclusive licence to use a certain patent, after covenants for payment of certain sums in the nature of royalties, there was the following clause: "that if it shall happen in any year during the continuance of the term that the royalties or sums of money hereinbefore covenanted to be paid shall not amount to the sum of 2,000*l.* sterling, then B. shall, within fourteen days after the expiration of any year in which it shall so happen, pay to A. such a sum of money as, with the said royalties, will amount to 2,000*l.* for that year, or if B. shall at any time make default in payment of such sum of money as aforesaid within the time appointed for payment,

then it shall be lawful to and for A., by writing signed by him and indorsed on the said indenture or duplicate thereof, to declare that the said indenture and the licence and power thereby granted shall cease and determine:" Held, that this was not an absolute covenant by B. to pay 2,000*l.* a year during the term, but only empowered A. to put an end to the grant upon non-payment of that sum. *Tielens v. Hooper*, 20 Law J. (N. S.) Exch. 78.

**DEBT.**—*Credit in particulars of demand*—*Damages.*—In an action of debt, the plaintiff in his particulars stated, "this action is brought to recover the sum of 1*s.* damages, for the detention of the debt for which this action is brought, together with the costs of suit; the debt, 86*l.* 9*s.*, having been paid by the defendant to the plaintiff after action brought." The plaintiff having proved at the trial a debt of 69*l.*, the verdict was held to have been properly entered for that sum, debt, and 1*s.* damages. *Nosotti v. Page*, 20 Law J. (N. S.) C. B. 81.

**DEBTOR AND CREDITOR.**—*Trustee for benefit of creditor*—*Assent by creditors.*—Where a deed of assignment of a debtor's personal property to a trustee, for the benefit of all his creditors who should execute or accede to the deed, was *bonâ fide* made and executed by both the debtor and trustee, and the property taken possession of under it, and afterwards the trustee, by his agent, communicated the contents of the deed and all that had been done to three of the creditors, each of whom expressed himself satisfied with the arrangement, but neither they nor any others of the creditors signed the deed or did any act under it: Held, in an interpleader issue between the trustee and a creditor at whose suit the property had subsequently been taken in execution, that the deed was valid and binding, and passed the property to the trustee as against such execution creditor, although not one of those to whom the contents of the deed had been made known. *Harland v. Binks*, 20 Law J. (N. S.) Q. B. 126.

**DISTRESS.**—*Privilege.*—Goods sent to an auctioneer to be sold in a room hired by him from one who has no authority to let it, are privileged from distress while they are in that room for the purpose of being sold by auction. The fact of such room never having been used as an auction room before, and only being hired for the occasion, is immaterial, as regards the privilege of the goods from distress. *Brown v. Arundell*, 20 Law J. (N. S.) C. B. 30.

**DOWER UNDE NIHIL HABET.**—On a plea of *tout temps prist* to a declaration in dower under the Statute of Merton, replication of a demand and refusal to render dower before the writ sued out, rejoinder traversing the demand and issue thereon found for the demandant, the demandant is entitled to damages from the death of her husband and not from the date of the demand only. Dower may be demanded by another person on behalf of the widow, and a demand in the presence of witnesses is not necessary. *Watson v. Watson*, 20 Law J. (N. S.) C. B. 25.



**EJECTMENT.—*Eatoppel*.**—A mortgagor of leasehold premises granted an under-lease. The original lease, by numerous mesne assignments, and by the assignment of the equity of redemption by the mortgagor, became absolutely vested in the lessors of the plaintiff as the legal personal representatives of the last assignee: Held, first, that, as the mortgagor had only the equity of redemption at the time of the grant, the under-lease operated as a demise by estoppel only between the parties to it; and that, as the mortgagor never afterwards acquired any legal interest in the premises, he could not pass any legal interest in that contract. Secondly, that although some of the mesne assignments were made subject to the under-lease, yet any possible effect of this circumstance was confined to the parties to the deeds, and inasmuch as neither the defendant, nor any person through whom he claimed, or with whom he had any legal privity, was a party to such assignments, the lessors of the plaintiff were in no respect bound or affected by the under-lease. Thirdly, that though payment of rent had been made in accordance with the terms of the under-lease, yet by such payment, and the other circumstances of the case, a tenancy from year to year only had been created, which was well determined by a regular notice to quit, served upon the attorney of the administratrix of the person who paid rent to the lessors of the plaintiff, and under whom the defendant claimed. *Doe d. Prior and others v. Ongley*, 20 Law J. (N. S.) C. B. 26.

**EQUITABLE ASSIGNMENT.—*Appropriation—Foreign attachment*.**—L. E., an officer, retired from the army, in consequence of which his commission became saleable, being indebted to the plaintiff in the sum of 500*l.*, he gave him a letter to Messrs. Cox, army agents, requesting them to pay the balance of the price of his commission to the plaintiff, who sent the letter, with another of his own, to Messrs. Cox, requesting payment, but they had not then received any money. The plaintiff having heard that an ensign had been gazetted again applied for payment, and he received a letter informing him that the ensign gazetted was not in succession of L. E., but that after the 14th of June he might draw on Messrs. Cox for 408*l.* 10*s.* 11*d.*, the balance arising from the sale of the commission. In the meantime M. S. obtained a foreign attachment from the Lord Mayor's Court against L. E. for 500*l.* due on a bill of exchange, and attached the monies, &c., of L. E. in the hands of Messrs. Cox. The plaintiff then filed this bill, and, upon an application for an injunction to restrain Messrs. Cox from parting with the money: Held, that Messrs. Cox had recognized the plaintiff's demand, and that it amounted to an appropriation of the money to arise from the sale of the commission; and an injunction was granted. *L'Estrange v. L'Estrange*, 20 L. J. (N. S.) Chanc. 89.

**EVIDENCE.—*Admissibility of—Character—Slander*.**—In an action for slander imputing to the plaintiff unnatural practices, to which there was only a plea of not guilty, the counsel for the defendant on cross-examination asked a witness: "Have you heard

from other persons that the plaintiff is addicted to practices of this kind?" Held, that the question was improper, as it was not confined to rumours existing before the words were spoken by the defendant. *Quære*, however, whether the question could have been allowed if it had been so limited. *Thompson v. Nye*, 20 Law J. (N. S.) Q. B. 85.

**EXECUTION.**—Whether execution, upon a judgment recovered against a railway company governed by the provisions of the Companies Clauses Consolidation Act, should issue against a shareholder, depends not only upon the plaintiff's failure to find sufficient property and effects of the company to satisfy his judgment, but also upon his having used due diligence to find such property and effects. Whether he has used due diligence is a preliminary matter, to be decided by the court upon the motion for leave to issue such execution. Where, however, a *sci. fa.* issues against a shareholder upon a judgment recovered against the company, such due diligence should be stated on the writ and may be traversed and tried by the jury. *Semble*, that the proper form of issuing execution under the 8 & 9 Vict. c. 16, s. 36, against the shareholder of a railway company is by *sci. fa.* *Devereux v. Kilhenny and Great Southern and Western Railway Company*, 1 Q. B. Pr. 788.

2. By a deed of settlement constituting a joint-stock banking company, it was provided, that before the husband of a shareholder became a member of the company he should take certain steps therein specified. A woman who was a shareholder of the company before her marriage, continued after her marriage and without her husband's knowledge, to receive dividends and pay calls in her maiden name upon her shares, which remained registered in that name, and she was so described in the list of shareholders returned to the Stamp Office. Her husband knew she was a shareholder, but did not take the steps required by the deed of settlement to become a shareholder in respect of her shares, or do any other act respecting them: Held, that execution could not be sued out against the husband upon a *sci. fa.* under the 7 Geo. 4, c. 46, s. 13, as a member for the time being. *Dogson v. Bell*, 1 Q. B. Pr. 812.

**FRAUD.**—*Delivering up of a bill of exchange—Medical attendant.*—A., the executor of B., filed a bill against C., stating that C. had fraudulently obtained a bill of exchange from B., and praying that the bill might be delivered up. It appeared that after the death of B., a captain in the navy, who died at a very advanced age in Greenwich Hospital, D., a dentist, produced a bill of exchange for 262*l.* alleged to have been given him by B., and stated at one time that 100*l.*, part of it, was for medical attendance and the rest a gift, and at another time that there was a contract that he was to attend to B.'s teeth for the rest of his life, and supply him with teeth. D. indorsed the bill to C. to whom he owed about 14*l.*, on the understanding that C. should bring an action on it for their joint benefit. The action was tried, and after the evidence for the plaintiff had been gone into, the counsel for the plaintiff had elected to be non-

suited. C. declined to give any undertaking to have another action tried at the next assizes. The court took into consideration the alleged fraud, and, being satisfied that an inference of fraud was to be drawn, ordered the bill to be delivered up. *Allen v. Davis*, 20 Law J. (N. S.) Chanc. 44.

**FRAUDS, STATUTE OF.** — *Agreement to pay the debt of another—Memorandum in writing.*—Debt on an Irish judgment. Plea, that the judgment was recovered against the defendant as surety for Scott, brothers, for monies advanced by the plaintiff to them; that, after the judgment recovered, the plaintiff settled with Scott, brothers, and that there was nothing due upon the judgment for monies advanced. Replication, that, after judgment recovered, an indenture was executed between the plaintiff and Scott, brothers, whereby, after reciting the judgment and various disputed accounts, an agreement was made between the plaintiff and Scott, brothers, for the settlement of all disputes, by which it was agreed (*inter alia*) that the plaintiff should advance 800*l.* to the Ulster Banking Company, which he had guaranteed to them, and 200*l.* to Scott, brothers, and that the debt from Scott, brothers, should be fixed at 1000*l.*, and that the agreement should be without prejudice to the security of the said judgment against the defendant. Averment, that after the making of the said indenture, and before the execution by the plaintiff, in consideration that the plaintiff would execute it, and would advance the said sums of 800*l.* and 200*l.*, the defendant promised that the said judgment should stand security for the repayment of the said sum of 1000*l.* and interest. Averment of performance by the plaintiff, and that the said sums of 800*l.* and 200*l.* had been advanced, but never repaid. Rejoinder, traversing the promise *modo et formâ*. Issue thereon. To prove this issue the plaintiff put in the following letter from the defendant and another surety, dated before the execution of the deed by the plaintiff: "We hereby consent to the within deed being executed by and between the parties, without prejudice to the rights and remedies of the plaintiff, &c., under his judgment for 10,000*l.*, to recover the sum of 1000*l.*, &c." This letter had been annexed to the deed, and was intended to have been sent therewith to the defendant for signature, but the letter alone was sent, and the defendant signed it without seeing the deed. *Semble*, that this was not a promise to pay the debt of another within the Statute of Frauds, but that if it were, there was a sufficient memorandum in writing, as the letter signed by the defendant incorporated so much of the deed as formed the consideration of his promise; and held, that the issue was rightly found for the plaintiff. *Macrory v. Scott*, 20 Law J. (N. S.) Exch. 90.

**GRAMMAR SCHOOL.** — *Appointment of trustees.*—By the provisions of a scheme for the management of King Edward the Sixth's Grammar School at Ludlow, duly confirmed by the Lord Chancellor, it was declared, "that the trustees should have authority from time to time, upon such grounds as they should at their discretion in the due exercise and execution of the powers and trusts reposed

in them deem just, from time to time to remove the master, usher, &c. from his office," subject however to certain formalities being observed: Held, that these words conferred an absolute discretionary power upon the trustees, provided the formalities specified were followed, and that they were not bound to summon the master before them, or to give him any hearing or opportunity of defending himself against the charges which formed the grounds of his removal. By an order, the Lord Chancellor, in whom the power of appointing new trustees was vested, referred it to the Master to approve of eight fit and proper persons to be appointed trustees in lieu of those dead, or who had left the borough of L.; and, after his report, such further order was to be made as was just. The Master reported that he had approved of eight persons as fit and proper persons to be appointed, &c. This report was confirmed, and in the confirmation the trustees of the charity (naming the said eight persons and the other trustees) were directed to pay the costs of the petition for the appointment of new trustees out of the surplus funds of the charity in their hands. By the private act, the property of the trust was vested in the trustees for the time being without any deed of transfer: Held, that this was a valid appointment of the eight new trustees by the Lord Chancellor. *Doe d. Childe (Trustees of Ludlow Charities) v. Willis*, 20 Law J. (N. S.) Exch. 85.

**INDICTMENT FOR ARSON.**—*Description.*—A. supplied the materials and superintended the building of some houses on his own freehold estate, with the object of letting or selling the houses. He also erected a building about 24 feet square, with slated roof, wooden sides, and glass windows; this was used as a storehouse for seasoned timber, as a place of deposit for tools, and as a workshop where timber was worked up into its proper form, and prepared for use. The prisoner wilfully set fire to this building: Held, that in the indictment for arson the building was correctly described as a "shed." *Semble*, per Patteson, J., that A. carried on the trade of a builder within the meaning of the statutes, and that the building might properly be described as a building for carrying on the trade of a builder. *Reg. v. Amos*, 20 Law J. (N. S.) M. C. 103.

**INDICTMENT.**—*Removal of, by certiorari—Costs*—5 W. & M. c. 11, s. 3—Where a child was found in the streets with marks of violent beating and ill-treatment upon it, and it was taken to the workhouse of an union, and the guardians, being informed that its father had committed the injuries upon the child, preferred an indictment against him for a misdemeanor, which the defendant removed by certiorari, and was on the trial found guilty: Held, that the guardians were, under the 5 W. & M. c. 11, s. 3, entitled to their costs as civil officers, prosecuting upon account of a fact committed or done that concerned them as officers to prosecute. In order to entitle a prosecutor to costs under that section, it is sufficient

to show that he prosecuted in pursuance of some moral obligation, and was not a mere volunteer. *Reg. on the prosecution of the Guardians of the West London Union v. —*, 20 Law J. (N.S.) Q. B. 104.

**INFANT.**—*Practice as to special case under the 13 & 14 Vict. c. 35.*—An application may be made by an infant for a guardian, under the 13 & 14 Vict. c. 35, s. 5, without a next friend. As to signature of counsel to special cases and setting down of special cases for hearing. *Craig, ex parte*, 20 Law J. (N. S.) Chanc. 136.

**INJUNCTION.**—*Mortgages.*—In 1830 W. conveyed certain real estates to Rhodes and Taylor, and their heirs, by way of mortgage for securing 400*l.*, with a power of sale in case of default. W. died in 1839, having devised the same property, subject to certain charges created by his will, to his sons A., B. and C. as tenants in common in fee. In 1839, after W.'s death, B. conveyed his one-third share under his father's will to Rhodes, Hirst and Naylor by way of mortgage, with power of sale in case of default. Rhodes, the surviving mortgagee of the deed of 1830, threatened to sell under the power of that deed unless A., the acting executor of W., would redeem both mortgages. Upon bill by A. to redeem, and for an injunction, the court, upon motion on payment into court by A. of the money due upon the first mortgage, restrained Rhodes from selling under the power contained in the deed of 1830, and from conveying the legal estate in the one-third share of B. comprised in the mortgage of 1839. *Whitworth v. Rhodes*, 20 Law J. (N. S.) Chanc. 105.

**INSOLVENT.**—*Final protection—Sums payable at a future time—Liability of surety for grantor of annuity—7 & 8 Vict. c. 96, s. 25.*—A surety for the grantor of an annuity who has become insolvent, and has obtained a final order for protection under the 5 & 6 Vict. c. 116, s. 10, is not protected from being sued on the default of the grantor, for instalments accruing due subsequently to the filing of the petition, by 7 & 8 Vict. c. 96, s. 25: his liability to pay not being a debt within the meaning of that section. *Thompson v. Whatley*, 20 Law J. (N. S.) Q. B. 86.

**INTERPLEADER.**—*Costs.*—Where an auctioneer, who was sued for the deposit money paid on a sale by auction of real estate, on the ground that the vendor's title was defective, applied for a rule calling upon the vendor and the purchaser to interplead, the court, on its appearing that the vendor had no other property than that of which the title was disputed, refused to substitute the vendor as defendant, unless the original defendant gave security for costs, and refused to allow the defendant his costs of the application out of the deposit money. *Deller v. Prickett*, 20 Law J. (N. S.) Q. B. 151.

**IRREGULARITY.**—*Waiver—15th Order of the 21st December, 1833.*—By inadvertence an order referring an answer upon

exceptions was directed to Master K. as the Master in rotation, the cause being already in the possession of Master B. The exceptions were argued on both sides before Master B. acting for Master K., who, after overruling an objection to the regularity of the order, allowed the exceptions and gave further time to answer: Held, upon motion to discharge the order, that the irregularity had been waived by the defendant arguing the exceptions. *Lloyd v. Peers*, 20 Law J. (N. S.) Chanc. 87.

**JUDGE'S ORDER.**—*Judgment by confession.*—A judge's order made by consent for immediate judgment and execution, is a judgment by confession within the 108th section of the 6 Geo. 4, c. 16. *Semble*, per Rolfe, B., that under the 12 & 13 Vict. c. 106, s. 133, execution upon such an order is only invalid where the order given is by way of fraudulent preference. *Andrews v. Diggs*, 4 Exch. 827.

**JUDGE.**—*Memorial to the crown by the representatives of the island complaining of his judicial conduct.*—On a memorial presented to the queen in council by the House of Assembly of the island of Grenada, complaining of the judicial conduct of the chief justice of that island as illegal and oppressive, being referred to the judicial committee of the Privy Council, it appeared from the evidence that during the fourteen years in which the chief justice had held office he had displayed on the bench several instances of intemperate and in some cases illegal conduct; but these acts were committed many years before the presentation of the memorial, without any complaint at the time of the chief justice's misconduct, the only act of recent date complained of being the fining of two magistrates for taking depositions in the third instead of the first person. In these circumstances the judicial committee reported to the crown, that having regard to the length of time which had elapsed since all the acts complained of, except that of fining the magistrates, (which though erroneous and improper had been committed by the chief justice in the execution of his duty,) they could not, sitting judicially, advise the crown to remove the chief justice for misconduct. *Representatives of the Island of Grenada v. Sanderson*, 6 Moore, 38.

**JOINT-STOCK COMPANY.** See COMPANY.

**LANDLORD AND TENANT.**—1. *Condition of premises—Action on the case—Deceit—Concealment.*—Where the intended lessor of a particular house knows that the house is in a ruinous state and dangerous to occupy, and that its condition is unknown to the intended lessee, and that the intended lessee takes it for the purpose of residing in it, he is not bound to disclose the state of the house to the intended lessee, unless he knows that the intended lessee is influenced by his belief of the soundness of the house in agreeing to take it, or unless the conduct of lessor amounts to a deceit practised



on the lessee. A declaration in case stated that the defendant, knowing that a certain house was in such a ruinous and dangerous state as to be dangerous to enter, occupy or dwell in, and knowing that the state of the house was unknown to the plaintiff, by agreement in writing demised the said house to the plaintiff, and the plaintiff agreed to take the same at a certain rent, the plaintiff having previously proposed to take the house for the purpose of immediately occupying and dwelling in the same; that the plaintiff commenced dwelling in the house without notice of its state, and so continued to the knowledge of the defendant; and that the defendant neglected his duty in not giving the plaintiff notice that the house was in the said state before entering into the said agreement, and before the plaintiff commenced occupying; that shortly after the plaintiff commenced occupying the house fell down; alleging special damage: Held, on demurrer to the plea, that this declaration was bad, there being nothing to show that the plaintiff was not to put the house into repair before he commenced occupying, and it not being alleged that he was induced by his belief of the soundness of the house to enter into the agreement, or that any misrepresentation was made by the defendant to the plaintiff as to the condition of the house. *Hill v. Gray*, 1 Stark. N. P. 434, distinguished *Keates v. Cadogan (Earl)*, 20 Law J. (N. S.) C. B. 76.

2. *Agreement to repair—Condition precedent.*—An agreement, under which the defendants became tenants to the plaintiff, stipulated that the defendants would maintain and keep the demised premises in good tenantable repair and condition (the same being first put into good tenantable repair and condition by the plaintiff), and in such repair and condition deliver up the same at the expiration of the tenancy: Held, in an action for a breach of the agreement by the defendants in not keeping and delivering the premises in good repair, that the plaintiff's obligation to put in repair was a condition precedent and not divisible; and therefore that performance of the extent only of putting a part of the premises in repair did not entitle the plaintiff to recover for a breach by the defendants as to that part. *Neale v. Ratcliffe*, 20 Law J. (N. S.) Q. B. 130.

LAND TAX.—*Stat. 42 Geo. 3, c. 116.*—Under stat. 42 Geo. 3, c. 116, a remainder-man in possession can compel the representatives of the tenant of a previous particular estate, who has redeemed the land tax, to receive the consideration money for such redemption with all arrears of interest, so as to free the land from the charge and payment of the interest, to which it was subject, for the benefit of such tenant under sect. 123; and a tenant in common of the remainder, if he tender the whole amount, and that is refused, and the interest distrained for, may plead the tender in bar of an avowry. *Cousins v. Harris*, 12 Q. B. 726.

LIMITATIONS, STATUTE OF.—*Supplemental answer.*—A

bill was filed against a lunatic and his committee in respect of a pecuniary claim against the lunatic, and the answer was filed in June, 1848. The lunatic died in June, 1849, and a bill of revivor and supplement was filed against his administrator in September, 1849, whose answer was filed in December, 1849, in which the benefit of the Statute of Limitations was claimed. In March, 1849, while witnesses were in the course of being examined, a motion was made that a supplemental answer might be put into the original bill, claiming the benefit of the Statute of Limitations. The motion was refused. Whether the benefit of the Statute of Limitations might be claimed at the hearing of the causes under the above circumstances, *quære*. *Percival v. Caney*, 20 Law J. (N. S.) Chanc. 42.

And see ATTORNEY.

**LUNATIC PAUPER.**—*Expenses of, when irremovable.*—The 12 & 13 Vict. c. 103, s. 5, provides that all the costs, &c. incurred or thereafter to be incurred in and about the obtaining any order of justices for the removal and maintenance of a lunatic pauper, who shall have been or shall be removed under any order to any asylum, &c., and who, if not a lunatic, would have been exempt from removal by reason of the 9 & 10 Vict. c. 66, shall be borne by the common fund of the union comprising the parish where such lunatic was resident when he was so removed to such asylum: Held, that these words must be read to include the expenses of maintenance, as well as those of obtaining the order of removal to the asylum, both of which were, under the circumstances specified, to be borne by the union comprising the removing parish. *Reg. v. Wigton (Overseers of)*, 20 Law J. (N. S.) M. C. 110.

**MADRAS CHARTER.**—*Construction of order of Supreme Court—Dismissing taxing master of the court, not an appealable grievance.*—An order made by the judges of the Supreme Court of Madras, dismissing the master of that court from his office for alleged official misconduct in the taxation of a bill of costs, revised upon the appeal by the Judicial Committee of the Privy Council. Such an order, being made by the Court at its own instance, is not an appealable grievance within the Madras Charter of Justice of December, 1800. An appeal having been allowed by the court below, and referred by her majesty to the judicial committee for adjudication in the ordinary way, their lordships, though of opinion that there existed no charter right of appeal, thought it a fit case for the allowance of a special appeal, and having heard the case upon the merits directed a petition for special leave to appeal to be presented to her majesty, which, on being referred to them, they recommended the allowance thereof, and that the appeal be placed in the same plight and condition as that originally referred to them. *Minchin, In re*, 6 Moore, 43.

**MORTGAGE.**—In a foreclosure suit the bill was taken pro confesso against two of the defendants. The cause was brought to a hearing, and these defendants did not appear: Held, that the plaintiff was entitled only to the ordinary decree, and not to a decree of foreclosure absolutely against them. An application for liberty to dispense with the service of a decree on defendants, against whom the bill has been ordered to be taken pro confesso, and who do not appear at the hearing, cannot be made at the hearing. *Brierly v. Ward*, 20 Law J. (N. S.) Chanc. 46.

**MUNICIPAL ACT.** See **PENALTY.**

**MUTINY ACT.**—*Desertion—Articles of War.*—The Mutiny Act and the Articles of War apply only to her Majesty's forces. An enlistment on a Sunday is not void under 29 Car. 2, c. 7. A recruit receiving enlisting money, knowing it to be such, from a soldier who was employed by a non-commissioned officer in the recruiting service, and who had belonged to a regiment for a longer period than that within which he ought to have been attested according to the provisions of the Mutiny Act: Held, that such soldier must be presumed to have been regularly attested. The fact that the soldier intended to have taken the recruit to be attested before a justice who had no authority to attest affords no counter presumption that the recruiting soldier had been himself improperly attested. The provision in the 55th section of the Mutiny Act, if any recruit shall receive enlisting money knowing it to be such, and shall abscond or absent himself from the recruiting party, and shall not voluntarily go before a justice within four days to be discharged, such recruit shall be deemed to be enlisted and a soldier as fully to all intents and purposes as if he had been duly attested, and may be apprehended and punished as a deserter: Held (hesitante Erle, J.), that a recruit who had not been discharged, and had absented himself more than four days after receiving the enlisting money, might be punished as a deserter, although he had never been attested. The 20th article of war provides that no officer commanding a guard shall refuse to receive or keep any prisoner committed to his charge by any officer or non-commissioned officer, who shall at the same time deliver an account in writing signed by himself of the crime with which the prisoner is charged: Held by Lord Campbell, C. J., Coleridge, J., and Wightman, J. (dissentiente Erle, J.), that a commanding officer receiving a soldier charged with desertion by a non-commissioned officer, who delivered a written signed charge of the crime, is justified under that article in detaining a soldier, although he was not taken before a civil magistrate, and a warrant obtained for his detention. The 20th article of war applies to military offences, including desertion; but by Erle, J., it applies only to those who are soldiers de facto, and not to those whose qualification as soldiers is disputed. *Wolton v. Gavin*, 20 Law J. (N. S.) Q. B. 73.

**NEW TRIAL.**—Where a cause has been regularly tried as undefended, and a verdict taken for the plaintiff in the negligent absence of the defendant's attorney, the court will grant a new trial on an affidavit of merits, but only on payment of costs. *Third v. Goodier*, 1 Q. B. P. 717.

**NONSUIT.**—*Judgment as in case of a.*—A defendant cannot move for judgment as in case of nonsuit after a peremptory undertaking, until after the sittings in the term in which the default is made are concluded. *Burn v. Cook*, 1 Q. B. P. 736.

**PARLIAMENTARY ELECTION.**—*Corrupting voter—Debt for a penalty—Variance.*—Debt to recover a penalty under the 2 Geo. 2, c. 24, for corrupting a voter. The first count of the declaration alleged the corrupting to have been by promising the voter, at his request, to pay to one W. G., for and on the account of such voter, 41*l.* 5*s.* then claimed from the voter by W. G., by then promising the voter to pay W. G. 10*l.*, to wit, on, &c., and the residue of the said sum by monthly instalments of 5*l.* The second count stated the corrupting to have been by giving, at the request of the voter, to W. G., 10*l.* for and on account of a debt of 41*l.* 5*s.* claimed to be due from the voter to W. G., and by then promising W. G., at the voter's request, to pay the residue of the said debt by certain instalments which were specified. Upon the trial, it appeared that the voter had applied to the defendant for money to redeem his boat held by W. G. as a security for a debt of 41*l.*, and thereupon the defendant promised to try and obtain the release of a boat provided the voter would give his vote for a particular candidate named; that the defendant in London then corresponded on the subject with H. at Harwich, the person in possession of the boat on behalf of W. G., the result of which was, that the defendant paid 10*l.* in London to the credit of H. with the Harwich Bank on account of the debt to W. G., and pledged himself to pay the balance of 31*l.* 5*s.* and the attendant expenses in monthly instalments of 5*l.*, and the boat was thereupon released and given up to the voter, who afterwards voted for the candidate named; it did not, however, appear that the voter had ever promised to vote for such candidate: Held, first, that it is necessary to state accurately the actual agreement when the means of corruption rests in agreement only, and therefore, that, had the first count stood alone, there might have been a fatal objection to the declaration on the ground of variance; secondly, that proof of the allegation in the second count of the actual payment of 10*l.* by the defendant to W. G. at the voter's request, was sufficient to support the action, and that the other allegations might be treated as surplusage: Held, also, that the venue in the action had been properly laid in Essex. *Baker v. Rush*, 20 Law J. (N.S.) Q. B. 106.

**PARTIES.**—*Creditors' deed.*—By a deed between A. of the first part, B. and C. stated to be creditors of A. of the second part, and

the creditors of A. who should execute the deed of the third part ; A. assigned his property to B. and C., on trust to pay H. a sum of money in respect of a lien on some of the property, and to divide the residue among the creditors ; B. never executed the deed, and his executors filed a bill to set it aside. The bill alleged that B. had died directly after the date of the deed, that C. was a bankrupt, that H. had not any lien and had acted improperly in the matter, and that it was the interest of the creditors who had executed the deed that it should be set aside. The only defendants were C., his assignees, and H. : Held, that one or more of the creditors who had executed the deed were necessary parties to the suit. *Gore v. Harris*, 20 L. J. (N. S.) Chanc. 74.

**PARTNERS.**—*Survivorship—Deceased partner—Executor de son tort, validity of transfer by.*—The plaintiffs were the owners of a woollen mill which had been occupied by a firm consisting of Abraham, Samuel and William R.; William having become a debtor to the defendant, and having died intestate, Abraham took possession of the mill and machinery, and carried on the business, without taking out administration to William. The plaintiffs having distrained for rent due from the firm, Abraham, on behalf of the firm, assigned to the plaintiffs, in the nature of a mortgage, the fixtures and machinery in satisfaction of the rent in arrear. The defendant afterwards brought an action against Abraham R., as executor de son tort of William, recovered judgment, and took the machinery and fixtures in execution: Held, in an action of interpleader, first, that there was no survivorship as to the property in joint chattels in the case of partnership, whether existing between merchants or manufacturers, or any other description of traders; secondly, that the surviving partners had no power, by virtue of the partnership relation, of transferring to the plaintiffs, by way of mortgage, a legal title to the share of the deceased partner William; and that, at all events, the transaction was not within the scope of any implied authority which a surviving partner might have to wind up the affairs of the partnership; quære, whether the partners could have given title by a sale of the share of the deceased partner William, made for the payment of his debts and their own; fourthly, admitting that Abraham, by joining in the conveyance of all the property to the plaintiffs, would, if he had been lawful executor, have been estopped from claiming the property of his testator as against them; yet the act of an executor de son tort had no such effect, for his act being good against the true representative only where it is lawful and such as the true representative is bound to perform in the due course of administration, the transfer by Abraham was not such an act, and therefore the third part of the goods might be seized under the defendant's execution against the goods of the deceased partner William; fifthly, that the defendant, by suing Abraham as executor, had not thereby admitted him to be rightful executor, and might, therefore, treat him as executor de son tort and dispute the validity of his transfer to the plaintiffs. *Buckley v. Barber*, 20 Law J. (N. S.) Exch. 114.

**PENALTIES.**—*Municipal Act, 5 & 6 Will. 4, c. 76.*—The name of the defendant, an inhabitant householder of a borough, appeared in the rate books of the borough of 1848-9, in respect of the occupation of a publichouse, for which also he paid his share of the rates in 1848. On the 14th of August, 1848, he let the publichouse, but retained in his occupation a warehouse that had formed part of the premises, and on the 14th of September, 1848, gave notice to the overseers of his having so let the house, and claiming to be rated in respect of his occupation of another house in the borough. His name, however, was not regularly inserted in the rate-books in respect of the latter house until March, 1849, nor did he pay any rate in respect of it until the 21st of September, 1848, and upon the revision of the burgess lists for the year 1848-9, his name was objected to and struck out: Held, in an action for penalties under the Municipal Act, 5 & 6 Will. 4, c. 76, s. 53, for acting as a town councillor on the 14th of February, 1849, without being duly qualified, that the defendant continued entitled to be on the burgess list of the borough for the year 1848-9, and therefore qualified in that respect to act as a councillor. The question in such cases is the qualification of the party, with reference to his title to be upon the burgess list and not the burgess roll. *Whalley v. Bramwell*, 20 Law J. (N. S.) Q. B. 53.

**PEREMPTORY UNDERTAKING.**—In country causes, if a plaintiff, having given a peremptory undertaking to try at the next assizes, enters the cause for trial at such assizes, and gives notice of trial accordingly, and it is made a remanet, that is a performance of the undertaking; and although he does not afterwards enlarge the peremptory undertaking, or try at the assizes after, the defendant is not entitled to a rule *ex parte*, absolute in the first instance, for judgment as in case of a nonsuit. Where such a rule had been obtained, and plaintiff had notice of it on the last day but three of Trinity term, and on the fourteenth day after such notice applied at chambers to have the rule set aside, and (proceedings being stayed) obtained a rule nisi for the same purpose at the beginning of Michaelmas Term: Held, that he was not too late. Two defendants being sued in an action of tort, one of them suffered judgment by default, and the other pleaded to issue; the latter obtained a rule absolute for judgment as in case of nonsuit, on the ground that plaintiff had not proceeded to trial in pursuance of a peremptory undertaking; before such judgment was signed, plaintiff obtained a rule nisi, calling on that defendant alone to show cause why the rule for judgment should not be set aside: Held, no objection to making the bill absolute, that the defendant who had suffered judgment by default was not called upon to show cause, and had not received notice. *Chapman v. Heslop and Raine*, 12 Q. B. 928.

**PLAINTIFFS.**—*Death of one of several.*—Where one of several co-plaintiffs dies, the surviving plaintiffs must, if they desire to bring that fact to the knowledge of the court in any proceeding in the cause, enter a suggestion of it upon the roll. Where, therefore, the defendant



obtained a rule for judgment as in case of a nonsuit, the court refused to discharge it except upon the usual peremptory undertaking to try, notwithstanding the production of an affidavit stating the death of one of the plaintiffs subsequently to the delivery of the declaration. That affidavit was intituled in the names of all the plaintiffs, both deceased and surviving. *Semble*, per Maule, J., that it was wrongly intituled. *Sarchin v. Buckle*, 1 Q. B. P. 740.

**PLEADING.**—1. In a declaration in case each count alleged that plaintiff was possessed of a dwellinghouse, and defendant of coal mines lying near to and under it, and that the dwellinghouse was supported in part by land between the same and the mines; and that the plaintiff “of right was entitled to and of right ought to have had his said dwellinghouse so supported in part by the said land without the hindrance or disturbance of any person.” The first count alleged that defendant “wrongfully and injuriously, in so unskilful, careless, negligent and improper manner, worked and excavated” the mines, that the land by which the house was in part supported was disturbed and withdrawn, and the support of the house injured and destroyed, and the foundations of the house gave way, &c. The second count alleged that defendant “wrongfully and injuriously made divers holes, excavations and cuttings in, and loosened and disturbed and removed a great part of, the said land” by which the dwellinghouse was in part supported, whereby the support of the house was injured, &c. (as before): Held, after verdict, a bad declaration, for not stating the grounds on which the plaintiff was entitled to have his house supported by the land above the mines. *Hilton v. Whitehead*, 12 Q. B. 734.

2.—1. The first count of the declaration, after alleging that plaintiffs were tenants of chambers to H. at the rent of 84*l.*, stated, that upon their letting those chambers to defendant as their tenant at the rent of 84*l.*, defendant promised to pay the said rent to H., or, if not, that he would indemnify plaintiffs in respect thereof, and would pay the same to them. Averment, that rent became due from plaintiffs to H., that defendant did not pay H. but plaintiffs paid him and requested defendant to pay them, who refused, &c. Whether the above count means that defendant promised to pay H. the rent due from plaintiffs to H., or the rent due from defendant to plaintiffs, *quære*: Held, however, that it does not mean that defendant’s promise was to extend further than his liability to pay rent under his own tenancy to plaintiffs. 2. Sixth plea, that before the rent grew due from plaintiffs to H., defendant’s tenancy ended by operation of law, by his delivering up possession to plaintiff C. Replication, that defendant of his own wrong delivered up possession, because it had been agreed that if plaintiffs gave defendant notice to determine the agreement between them and defendant, they would not prevent his becoming tenant to H.; that they were always and still ready and willing to suffer him to occupy as a tenant to H., and had not prevented him; that plaintiffs received possession of the chambers from defendant for the purpose of letting them for him; that they

refused to accept possession except upon the terms that defendant should not be released from his liability, and that possession was taken on no other terms; without this, that the term was surrendered by operation of law, &c.: Held, upon special demurrer, that the replication was bad, on the ground that the inducement was inconsistent and incongruous with the traverse. 3. Seventh plea, that before the same rent became due, it was agreed between C., one of the plaintiffs, on behalf of himself and his co-plaintiff and defendant, that the latter should deliver up the chambers to plaintiff C., and be discharged from further liability, and that possession was accepted accordingly. Replication, traversing that it was agreed between plaintiff C., on behalf of himself and his co-plaintiff and defendant, that defendant should be discharged from further liability, and that possession was accepted accordingly: Held, first, that the seventh plea set up a good defence; secondly, that the replication was too large, for traversing not only that the agreement was made by C., but also that it was made by him on behalf of himself and his co-plaintiff; third, that this was an objection of substance, and available upon general demurrer. Whether the replication was not also double and multifarious for denying the acceptance of possession as well as the agreement, *quære*. 4. Eighth plea, that before the same rent became due, plaintiff C., with the sanction of his co-plaintiff, evicted defendant. Replication, traversing eviction by C. with the sanction of his co-plaintiff: Held, that the replication was too large. 5. The second count was for use and occupation, the third upon an account stated. Eleventh plea, to those counts, that after the causes of action accrued defendant was discharged by order of the Insolvent Debtors' Court. Replication as to so much of the plea as relates to the third count, that the cause of action accrued after the order: Held, that the replication was bad, as amounting to an argumentative traverse of the plea. *Smith v. Lovell*, 1 Q. B. P. 794.

3. *Answer*.—A., B. and C. carried on business in partnership as bankers. A. died, having made B. and D. his executors, and S. a residuary legatee. D. was after the death of A. admitted a partner in the business. A bill was filed by S. against B. and D. for the administration of the estate of A. It stated that the executors had rendered imperfect accounts, particularly with reference to A.'s capital in the business at his death; that the business had since A.'s death been carried on with his capital, and that the residuary legatees were entitled to one-third of the profits. It contained interrogatories, whether the business had not been carried on with A.'s capital—what were the profits since the death of A.—what was the present capital—and what capital had been drawn out since A.'s death. C., the other partner, was not a party to the bill: Held, that in a suit so constituted, B. and D. were not bound to answer the above mentioned interrogatories. *Simpson v. Chapman*, 20 Law J. N. S. Chanc. 88.

4. *Argumentativeness—Immaterial issue—Deed of arrangement*.—A plea to a declaration in debt, after setting out a deed, which it alleged to be a deed of arrangement under 12 & 13 Vict. c. 106,

between the defendant and his creditors, stated, that the creditors by whom and on whose behalf the same was sealed "were more than six-sevenths, to wit nine-tenths," in number and value of the creditors of the defendant, &c.: Held, on special demurrer for argumentativeness, and for attempting to raise an immaterial issue, &c., that the plea sufficiently stated the deed to have been signed "by or on behalf of six-sevenths of the creditors," within the meaning of sect. 225. *Stewart v. Collins*, 20 Law J. N. S. C. B. 79.

5. *Assumpsit for not delivering goods according to contract.*—Assumpsit on a contract for sale and delivery by defendants to plaintiffs of iron rails, to be inspected and certified as then agreed upon between the parties, and to be equal in quality to any rails made in Staffordshire; charging as breach that certain rails so delivered by defendants were not equal, &c. Plea, that by the said agreement the rails were to be inspected and certified as in the count mentioned, viz. to be inspected before delivery by an agent of the plaintiffs, who was to be at liberty to approve and accept for plaintiffs as he should think fit any of the rails, and to certify as he should think fit to plaintiff respecting the same; and that the rails in question were inspected before delivery, and were thereupon approved and accepted in performance of the agreement for the plaintiffs by G. their agent, appointed in pursuance of the said agreement: Held, on demurrer to the replication, a bad plea, as giving no complete answer to the declaration. *Bird v. Smith*, 12 B. Q. 786.

6. *Church—Disturbance in a pew.*—To a declaration alleging the plaintiff's right to the use of a pew in a parish church by reason of his possession of a house in the parish, and complaining of disturbances in such pew on the 1st of January, 1849, and on divers other days and times, the defendant pleaded, thirdly, leave and license generally; and, fourthly, that before any of the trespasses, it was agreed between the plaintiff and the defendant and J. A., the churchwardens of the said parish, that the defendant and J. A. should partition the said pew into two small pews, and should have full licence, by themselves or others, to enter and continue in one of such small pews during divine service; and that the said defendant and J. A. did, in pursuance of the agreement and licence, so divide the pew and commit the other alleged grievances, as the defendant lawfully might. To the third plea, so far as related to the grievances committed before a certain day, to wit, the 8th February, 1849, the plaintiff replied *de injuriâ*, and to the residue of the grievances, that before they were committed, the plaintiff revoked the said alleged leave and licence. To the fourth plea the plaintiff replied, as to the grievances before a certain day, to wit, the 8th of February, 1849, that there was no such agreement as alleged, and, as to the residue of the grievances, a revocation of the licence in that plea alleged: Held, upon special demurrer, first, that the second part of the replication to the third plea did not amount to an argumentative traverse of the alleged licence; but that if it did, the first part of the replication would not, therefore, have been vitiated, inasmuch as the plea was in its nature divisible; secondly, that the

fourth plea was not divisible in its nature, and therefore, first, that the whole replication being double was bad, and, secondly, that the two parts of the replication taken separately were bad, on the ground that each was replied to a part of the plea only, whilst, if true, they were respectively an answer to the whole, and, thirdly, that the latter part was bad as a new assignment for informality: Held, also, that the plaintiff had a right to revoke the alleged licence. But *quære*, whether if the defendants had justified in their character of churchwardens, the plaintiff's right in that respect would have been different. *Adams v. Andrews*, 20 Law J. (N. S.) Q. B. 33.

7. *Debt on bond*.—Debt against the defendant as surety for J. C. on a bond conditioned that J. C. would duly and faithfully account for, apply and pay to the plaintiff all sums of money which had or should come to his hands as treasurer of the S. M. turnpike roads according to the direction, true intent and meaning of the 26 Geo. 4, c. lxxi, and three other acts extending that act, and of the 3 Geo. 4, c. 126. Plea, that the 3 Geo. 4, c. 126, was repealed by the 4 Geo. 4, c. 95, and that up to the time of such repeal J. C. had duly and faithfully accounted, &c. Replication, assigning as a breach that although after the said repeal J. C. was required by the then trustees of the S. M. roads to render to A. C. P. and S. G., then being persons duly appointed by them for that purpose, a true and perfect account in writing of all monies which he had received and disbursed as treasurer, and although a reasonable time had elapsed, yet the said J. C. had not rendered such account; and for a further breach, that J. C. had received large sums of money as treasurer, and had failed duly to account for and pay the same, according to the true intent and meaning of the said acts and the statute 3 Geo. 4, c. 126, and of the said bond, although before and after the said repeal large sums remained in his hands, and although during all the time there were trustees entitled and ready to receive the same, and although no other person was authorized to receive the same. Rejoinder, as to the first breach, that a part of the sum was received by J. C. before the repeal of the 3 Geo. 4, c. 126, for which he had duly accounted, and that the residue of the said sum was received after the repeal of the 3 Geo. 4, c. 126; and as to the other breach, that no part of the sums in that breach mentioned was received by J. C. before the repeal of the 3 Geo. 4, c. 126: Held, upon demurrer, first, that the repeal of the 3 Geo. 4, c. 126, did not of itself render the bond invalid, supposing the enactments of the local act to be sufficient for enforcing it; secondly, that the first breach assigned was bad, as the local act provided only for the treasurer being called upon to account to the trustees themselves, and the section in the 3 Geo. 4, c. 126, requiring the treasurer to account to such person or persons as the trustees should appoint, had been repealed by the 4 Geo. 4, c. 95; thirdly, that although the other breach required no aid from the repealed section of the 3 Geo. 4, c. 126, and therefore that the statement as to that act was surplusage, yet as there was no allegation of a requisition to account or pay, as provided by the local act, the breach failed to show

a forfeiture of the bond under that act, and was therefore bad; fourthly, that the plea admitting a non-performance of the condition subsequent to the repeal of the 3 Geo. 4, c. 126, did not answer the whole of the declaration, and was therefore bad. *Davis v. Carey*, 20 Law J. (N.S.) Q. B. 68.

8. *Several pleas with trespass quare clausum fregit*.—The defendant to an action of trespass quare clausum fregit may still plead together the pleas of not possessed and liberum tenementum, notwithstanding the former plea puts in issue the possession and also the right to the possession of the close in question. *Slocombe v. Lyal*, 20 Law J. (N.S.) Exch. 95.

9. *Time for pleading under Reg. Gen. Mich. 3 Will. 4 (12)*.—Reg. Gen. Mich. 3 Will. 4 (12), which directs that where the time for pleading shall not expire before the 10th of August, it shall run from the 24th October following, applies where, according to the practice during other parts of the year, the time for pleading would expire upon the 10th of August. Therefore, if an eight days' notice to plead be given on August 2nd, judgment signed on the 11th for want of a plea, is irregular. *Severin v. Leicester*, 12 Q. B. 949.

10. *Trespass*.—To a declaration in trespass for breaking plaintiff's close and digging up and carrying away the turf, defendant pleaded that the close was the close of W. and others as tenants in common and justified under licence from W. On motion for judgment non obstante veredicto: Held, a bad plea, because W., the tenant in common, could not himself have done the act, which amounted to a destruction, and therefore he could not authorize another to do it. Defendant also pleaded that the close was not plaintiff's. Held, that he did not support his traverse by proof that the plaintiff was tenant in common with another person under whom defendant acted. *Wilkinson v. Haygarth*, 12 Q. B. 837.

POOR LAW.—1. *Order of removal—Interruption of residence*.—The absence of a person from a parish in which he is residing, in consequence of an imprisonment out of the parish, is not of itself such an interruption of the residence as would prevent his becoming irremovable by five years residence, including the time of the imprisonment, if an intention to return at the expiration of the imprisonment exists throughout it. Therefore, where a pauper had resided for five years in the respondent parish, and during that time had been imprisoned in an adjoining parish for seven days under a conviction in default of paying a fine, and had afterwards returned to his residence, it was held, that he was irremovable under the 9 & 10 Vict. c. 66, s. 1. *Reg. v. Holbeck (Overseers of)*, 20 Law J. (N.S.) M. C. 107.

2. *Settlement by estate*.—The father of a pauper had gained a settlement in the township of B. on the sixth of April, 1837, by renting a tenement. He had also been the owner of a freehold estate in the township of C. for some years before, and down to 1838, and it was admitted that on the 27th of April, 1837, he had resided and slept for more than forty days upon his estate in C. since the purchase of



it, several days residence between the 6th and 27th of April, 1837, being included in the computation of such forty days. An order for removal of the pauper to C., as the place of his derivative settlement, was obtained on the 28th of November, 1849: Held, that the residence in C. had the effect of superseding the settlement gained in B. and of establishing a subsequent settlement in C., to which the pauper might properly be removed. *Reg. v. Knaresborough (Inhabitants of)*, 20 Law J. (N. S.) M. C. 147.

**POOR RATES.**—*Concerts and musical entertainments.*—The Manchester concert hall was built by a society, partly from funds subscribed by eighty individuals, who were among its first subscribers, and was held in trust to pay off that amount, and subject thereto in trust for the society. The number of subscribers of five guineas each annually to the society was 600; and besides these there was another class of members called quasi members, who paid an annual subscription of two guineas and a half each, and all were admitted by ballot. The annual subscriptions, amounting to about 3,000*l.*, went to pay off the above debt and interest, and to meet the current expenses of furnishing the concert hall and supporting the society generally. The concert hall was used by the society for concerts and musical entertainments open to subscribers, and parties admitted by tickets to subscribers, at which music of a high class was generally practised and performed, and for the general business of the society; except on one occasion in 1848, when the use of the hall was given gratuitously by the society for the charitable purpose of a public concert on behalf of the funds of the Manchester Royal Infirmary. Each subscriber was entitled to tickets of admission to every public and private concert, which were transferable to ladies generally and to gentlemen and quasi subscribers subject to certain restrictions. Each subscriber might also give orders for the admission of four persons to the private or undress concerts. The quasi subscribers were each entitled to admission without ticket to the private or undress concerts. Most of the vocal and instrumental performers were paid out of the amount subscribed, which was also expended in the purchase of music for the society's use. A highly skilled professor of music was induced to settle and remain in Manchester, solely because of the existence of the society, the tendency of which had been to promote and improve the science and practice of music in Manchester and the neighbourhood. No dividends or bonus in money had ever been made to any of the members, and the rules of the society provided that in the event of a dissolution the funds, after payment of all debts, should be applied to the promotion and encouragement of music: Held, that the society could be regarded only as a musical club, the primary object of which was the gratification and amusement of the members and their families, and therefore not entitled to an exemption from poor rates as a society instituted for the purposes of the fine arts exclusively, within the 6 & 7 Vict. c. 36: Held also that had the society been otherwise entitled to the exemption, the accidental use of the hall for the benefit of the infirmary in 1848 would not have affected the right to exemption. *Reg. v. Brandt*, 20 Law J. (N. S.) M. C. 119.



**POWER.—Leasing.**—The latest lease preceding the creation of a leasing power is of greater weight as to the ancient and accustomed rent than any single earlier lease, and ought to govern where there is a balance of evidence; but if the ancient custom is uniform, and the single lease varying therefrom is granted just before the creation of the power, such exceptional lease cannot be taken as evidence of the custom. By a will dated in 1761, a power was given to the tenants for life to lease for three lives lands usually so letten, provided there were reserved the ancient and accustomed rents and heriots or more, and usual and reasonable covenants. By a codicil dated 1763, provisions for a younger child were made, and the will was in all other respects confirmed. By a lease in 1724, the rent reserved is 1*l.*, the heriots 3*l.*, and the fine paid 9*l.* By a subsequent lease of the same premises in 1762, the rent was 15*l.*, which was the rack rent value, and there was no fine or heriot. By a lease of 1824 of the same premises, purporting to be made under the power, the rent and heriots reserved were the same as in the lease of 1724: Held, first, that it was a question for the jury under these circumstances, whether of the two leases (of 1724 or of 1762) reserved the ancient and accustomed rent, so as to be the pattern for future leases: Held, secondly, that the rule that a codicil confirming a will makes the will to have the date of the codicil, is subject to the limitation that the intention of the testator be not thereby defeated; and therefore, as the codicil in the present case, if it brought down the date of the will to 1763 for all purposes, would materially alter the power contained in the will, and so contravene the intention of the testator, the leasing power must be taken to speak from the date of the will, and not from the date of the codicil. *Doe d. Biddulph v. Hole*, 20 Law J. (N. S.) Q. B. 57.

**PRACTICE.—1. Affidavit of service.**—Decree taken against a defendant on an affidavit of service of the subpoena to hear judgment. The affidavit stated service on T., who, according to the belief of the deponent, was the defendant's solicitor: Held, that if it should appear on the record that T. was such solicitor, the affidavit would be sufficient. *Marsden v. Blundell*, 20 Law J. (N. S.) Chanc. 104.

**2. Motion—Stat. 13 & 14 Vict. c. 35—Reference to the Master as to debts.**—A motion, under the 19th section of the 13 & 14 Vict. c. 35, for a reference to the Master to take an account of the debts of a deceased person, must be made in court. *Harrold, In re*, 20 Law J. (N. S.) Chanc. 168.

**3. Motion for new trial after bill of exceptions tendered.**—Where a bill of exceptions has been tendered, the party cannot afterwards move for a new trial upon a point which might have been (but was not) included in the bill of exceptions, without abandoning the bill of exceptions. *Semble*, that if the point could not have been included in the bill of exceptions, the motion for a new trial might have been made concurrently. *Adams v. Andrews*, 20 Law J. (N. S.) Q. B. 39.

**4. New trial, time of moving for.**—Where a party has obtained a rule nisi for a new trial by leave of the court after the expiration of

the first four days of term, but without giving notice within that period to the opposite party of his intention to move, and the opposite party has signed judgment without any notice of the motion, the court will not permit the rule to be made absolute if the objection is raised on showing cause. *Quære*, whether an application to set aside the judgment might not have been made promptly. *Doe d. Whitty v. Carr*, 20 Law J. (N. S.) Q. B. 83.

5. *Notice of trial after injunction*.—A town cause having been made a remanet, and then postponed by consent to the sittings after Hilary Term, 1849, further proceedings were stayed by an injunction obtained by the defendant on the 11th of January, 1849. The injunction was dissolved on the 7th of August, 1850: Held, that the plaintiff was not bound to give a fresh notice of trial for the sittings after Michaelmas Term. *The Stockton and Darlington Railway Company v. Fox*, 20 Law J. (N. S.) Exch. 96.

6. *Stay of proceedings in error till security given for costs*.—Where a plaintiff in error, defendant below, died after a joinder in the Exchequer Chamber, that court stayed proceedings till security for costs should be given to the defendant in error, upon affidavits showing ground for believing that the plaintiff in error had died insolvent, and that his attorney was prosecuting the writ in error at his own risk, and for his own benefit. *Haygarth v. Wilkinson*, 12 Q. B. 851.

7. *Trial—Right to begin*.—A new trial will not be granted because a judge has wrongly ruled at nisi prius as to which party must begin, unless such ruling did clear and manifest injustice. *Branford v. Freeman*, 20 Law J. (N. S.) Exch. 36.

PRODUCTION OF DOCUMENTS.—*Banking firm*.—A defendant admitted that certain documents were in the possession of himself and W. C., his co-executor, and that others were in the possession of their solicitor, W. C. not being a party to the suit: Held, that an order for production could not be made against the defendant on such an admission. *Morrell v. Wotten*, 20 Law J. (N. S.) Chanc. 81.

PROMISSORY NOTE.—*Joint and several payment—Pleading—Evidence*.—An agreement between the payee and one of several makers of a joint and several promissory note, that the payee shall take another promissory note in satisfaction of the first, with payment of the note taken by the payee on such understanding, amounts to payment by the other makers of the joint and several note. A joint and several promissory note had been given by the defendant and K. to the plaintiffs. K. agreed with L. and the plaintiffs that the plaintiff should take L.'s promissory note in satisfaction of the defendant's liability on his joint and several note. The plaintiffs, having taken L.'s note on that understanding received payment of it from R., authorized by L. to pay it: Held, that, in an action on the first note, the above facts might be given in evidence under a plea alleging payment by the defendant. *Thorne v. Smith*, 20 Law J. (N. S.) C. B. 74.

**RAILWAY.**—*Award of compensation—Lands Clauses Consolidation Act—Payment of arbitrator's fees—Duty of railway company—Taking up award—Mandamus.*—A railway company are bound under the 35th section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, to take up an award of compensation for land required by the company, and forthwith to furnish a copy to the owner of the land; and it is no good return to a mandamus for that purpose, that the company were willing to receive the award and to furnish such copy, but were prevented by reason of the arbitrator's refusal to deliver it up to them without the payment of his fees, there being nothing in the act to affect the arbitrator's common law right of lien. *Reg. v. South Devon Railway Company*, 20 Law J. (N. S.) Q. B. 145.

**RAILWAY CLAUSES ACT.**—*Limits of deviation.*—A railway company having opened their main line for traffic, but not having completed the stations and works, are entitled under the Railway Clauses Act, 8 Vict. c. 20, s. 16, to take compulsorily within the time for completing the railway and works any land situate within the limits of deviation for the purpose of making a branch railway. *Sadd v. Maldon, Witham and Braintree Railway Company*, 20 L. J. (N. S.) Exch. 102.

**RAILWAY COMPANY.**—1. *Liability for negligence of workmen.*—A railway company by agreement under seal, engaged a contractor to execute the railway, reserving power to the company to watch the progress of the work, and to dismiss any incompetent workmen employed by the contractor. In constructing a viaduct, part of the railway, over a public highway, a stone, through the negligence of the workmen, fell upon the plaintiff's husband who was passing along the road underneath, and caused his death: Held, that the company was not liable in an action against them for damages under the 9 & 10 Vict. c. 93, by the widow and administratrix of the deceased. *Reedie v. London and North Western Railway Company*, 20 Law J. (N. S.) Exch. 65.

2. *Mandamus—Construction of cross road, bridge, &c.—Rates of inclination—Compliance with plans deposited—8 & 9 Vict. c. 20; 9 & 10 Vict. c. ccxlix.*—Mandamus commanding the Caledonian Railway Company to construct a public carriage road and a bridge for carrying the same over the railway and the approaches thereto, under the obligations contained in the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, and the company's special act, and in conformity with a plan, section and cross section deposited with the clerk of the peace, and as therein particularly marked. From the return by the company, it appeared that in making the railway within the deviation line authorized by the special act, a part of the said carriage road and the rates of inclination thereof as delineated in the said cross section had been altered, and that it was impossible consistently with such deviation line to make and complete the alteration in the said road in conformity with the rates of inclination delineated in the said plan and section and cross section: Held,

upon demurrer, that the 14th section of the 8 & 9 Vict. c. 20, applied to the construction of the railway and not to cross roads, and that the 9th section of the special act, 9 & 10 Vict. c. ccxlix. provided that it should be lawful for the company to construct the bridges for carrying the railways thereby authorized over any roads of the heights and spans and in the manner shown on the sections deposited, applied only to the height and spans, and not to the rates of inclination delineated in the sections deposited, and, therefore, that the mandamus could not be supported. *Reg. v. The Caledonian Railway Company*, 20 Law J. (N. S.) Q. B. 147.

**RAILWAY SCHEME.**—*Right of allottee to recover deposit.*—The plaintiff in answer to an application on his part, had shares allotted to him in a company provisionally registered for making a railway, the prospectus of which stated that the capital of the company was to be 700,000*l.*, that there were to be 35,000 shares of 20*l.* each, and that all the shares had been allotted. He paid a deposit on his shares and executed the subscription contract, which deed, after setting forth the intended railway, stated that the company was to have a capital not exceeding 700,000*l.*, and it authorized the directors to apply the deposits for the purposes of the undertaking and to indemnify themselves. All the shares were not, in fact, allotted, nor was there any likelihood that they ever would be allotted. The company, after incurring great preliminary expenses, were unable to comply with the Standing Orders of the House of Commons and leave to bring in a bill to carry out the scheme was refused. The plaintiff brought assumpsit for money had and received against a director to recover back his deposit. On the trial, the judge told the jury that the scheme having failed, the plaintiff was entitled to recover back his whole deposit, as he had subscribed to and executed the subscription contract in an association in which the capital was to be 700,000*l.* and the number of shares 35,000, all of which it was said had been allotted, and it had turned out that the whole number of shares had never been subscribed for, and therefore that the committee were not authorized to go to parliament at the plaintiff's expense. He added that the plaintiff's execution of the deed had no material effect on his right to recover, as the deed was applicable only to a scheme in which 35,000 shares had been allotted: Held, on a bill of exceptions to this ruling, that the direction of the judge was wrong; that the deed, which merely stated that the capital was not to exceed 700,000*l.*, must be read by itself, and not with reference to the previous verbal contract between the parties, and that by executing it the plaintiff had authorized the directors to apply his deposit for the purposes of the undertaking set forth in the deed. *Watts v. Salter*, 20 L. J. (N. S.) C. B. 43.

**SEWERS.**—*Jurisdiction and powers of commissioners—Opposition to bill in parliament.*—A bill being introduced into parliament for the purpose of more effectually draining a particular district of level through a certain other district entirely within the jurisdiction of the Commissioners of Sewers for the county of Norfolk acting

under the 3 & 4 Will. 4, c. 42, the commissioners, apprehending that the provisions of the said bill would, if passed, occasion an injury to the land within their jurisdiction, bonâ fide and with discretion and prudence caused their clerks to take all reasonable and necessary steps for opposing the bill in parliament, and to prevent its passing or to obtain the adoption of certain clauses, and a considerable amount for costs and expenses had been incurred and remained due to the clerk, who had since died: Held, that his legal representatives were entitled to a mandamus, directing the commissioners to levy a rate on the land within their jurisdiction, under the 4 & 5 Vict. c. 45, and to pay off the amount due for such costs and expenses. *Reg. v. Commissioners of Sewers for county of Norfolk*, 20 Law J. (N. S.) Q. B. 121.

**SHAREHOLDER.** See COMPANY.

**SHERIFFS COURT ACT.**—*London.*—Stat. 10 & 11 Vict. c. lxxi, s. 1, enacts, that all personal actions (with some exceptions not material), where the debt or damage does not exceed 20*l.*, which shall be commenced in the Sheriffs Court of London, shall be holden according to the provisions of that act. By section 40 process may be issued out of that court, provided that defendant dwell, or shall within six calendar months have dwelt, within the city or liberties; or if the cause of action arose therein. Section 113 deprives the plaintiff of costs if he sues in a superior court and recovers less than 20*l.* for any cause for which a plaint might have been entered in the London court; excepting out of this clause actions which before the statutes might have been brought in the superior courts, where the parties live more than twenty miles from each other, or where an officer of the London court is a party, which actions by section 112 may be brought in the London court or a superior court at the plaintiff's option: Held, that a party suing in a superior court on a promissory note and recovering less than 20*l.*, may be deprived of costs under section 113, though the cause of action has no locality. *Lowley v. Ross*, 12 Q. B. 952.

**SHERIFF.**—*Duty of*—*Selling for under price*—*Pleading.*—In an action upon the case by a judgment creditor against the sheriff, to whom a writ of fi. fa. had been delivered to be executed, the declaration alleged that there were in the bailiwick of the sheriff divers goods of the judgment debtor; and that although the defendant, in the reasonable and proper discharge of his duty to the plaintiff and the judgment debtor, might have made of the said goods the monies indorsed on the writ, and although a reasonable time for doing so had elapsed, yet the defendant did not within such reasonable time levy or cause to be made of the said goods the said monies, but neglected so to do. The defendant pleaded not guilty: Held, that the declaration was supported by proof that the goods seized by the sheriff had been improperly sold at a less price than ought reasonably to have been got for them. *Mullett v. Challis*, 20 Law J. (N. S.) Q. B. 161.

**SHIP AND REGISTRY ACT OF INDIAN LEGIS.**

**LATION** (Act No. X. 1841).—A ship built in a foreign port in India in 1817, within the limits of the Company's charter, by foreigners, and which sailed under foreign flags until 1838, when it was then and thereafter owned by and belonged to British subjects resident at Bombay, is entitled, under the proclamation of the Governor General in council, and the Act of the Legislative Council of India, No. X. of 1841 (passed in pursuance of the powers granted by the statute 3 & 4 Vict. c. 56), to be registered at Bombay as a British ship for the purposes of trade within the limits of the company's charter. *Crawford v. Spooner*, 6 Moore, 1.

**STAMP.—Receipt—Agreement.**—The following document was held to be admissible in evidence stamped as an agreement and not as a receipt:—"I have received your cheque for 391*l.* 10*s.* 3*d.*, being the payment of an overdue bill and interest in the hands of the Derby and Derbyshire Bank; and I hereby undertake to procure and hand the said bill over to you; and I have now given you Messrs. Dixon's order for 500 tons of iron." *Von Dadelszen v. Swann*, 20 L. J. (N. S.) Exch. 50.

**TITHES.—Validity of an award**—53 Geo. 3, c. 127, *pleaded at the bar*.—In a suit for an account of tithes the defendant set up an award which declared that a certain sum should be paid in lieu of tithes, provided the whole lands were subject to tithes; but if only subject to tithes according to a specified terrier, then a different sum was awarded. The defendant's counsel also set up at the hearing the statute 53 Geo. 3, c. 127, as a bar to the recovery of tithes for more than six years. The statute was not pleaded by the answer of the defendant: Held, that the award not being final was void, but that the plaintiff was only entitled to an account of tithes for six years before the filing of the bill. *Goode v. Waters*, 20 Law J. (N. S.) Chanc. 72.

**TRESPASS.—1. Plea of justification.**—Trespass for that the defendant "assaulted the plaintiff, and beat, bruised, pushed, dragged and pulled about, kicked, wounded and ill treated him, and then knocked down and prostrated him on the deck of a certain vessel, and then hit and struck him numerous blows." Plea "as to the assaulting, beating and ill treating" the plaintiff, a justification by the defendant as captain of a vessel on board of which the plaintiff and others were passengers, and alleging that the plaintiff made a great noise, disturbance and affray on board the said vessel, and was then fighting with another person, "then also being a passenger in and on board of the said vessel, and whose name was to the defendant unknown," and was striving to beat and wound the said person; wherefore the defendant, as such captain, to preserve peace and order, and prevent the beating and wounding of such person, gently laid his hands upon the plaintiff, which was the trespass complained of: Held, first, that the plea would have been good without the statement that the person with whom the plaintiff was fighting was a passenger on board the vessel, whose name was unknown to the defendant;



secondly, that such statement did not necessarily contain matter of description, and consequently that a failure of proof of that part of the plea was not material; thirdly, that the knocking down and prostrating of the plaintiff was alleged as a distinct trespass, and was not covered by the justification in the plea. *Noden v. Johnson and another*, 20 Law J. (N. S.) Q. B. 95.

2. *For mesne profits—Mortgagee.*—A party having mortgaged his premises to the plaintiffs in 1846, and being allowed to remain in possession, let them in 1848 to the defendant. In October, 1849, the plaintiff, without having made an entry on the premises, or having been otherwise in possession, brought ejectment against the defendant, who gave his consent to a judge's order dated the 31st of October. The order directed proceedings to be stayed till the 15th of November then next, the tenant in possession undertaking on that day to give up possession to the plaintiff, and that in default the plaintiff should be at liberty to sign final judgment and issue execution against the tenant for the costs of such judgment, execution, writ of possession, costs of levy, &c. On the 15th of November the plaintiff first entered into possession of the premises and brought an action for mesne profits, accrued between November, 1848, and the 15th of November, 1849: Held, that the plaintiff not having been in possession of the premises prior to the 15th of November, could not maintain the action, his entry on that day not having relation back to his title as mortgagee, and that the judge's order made no difference in the case. The doctrine of entry by relation applies to the case of disseisor and disseisee only. *Litchfield v. Ready*, 20 Law J. (N. S.) Exch. 51.

**TRESPASS QUARE CLAUSUM FREGIT.**—*Plea of justification—Right of common of turbary.*—Trespass for breaking and entering a close of the plaintiff, and breaking down a wall. Pleas justifying the alleged trespass under the exercise of a right of common of turbary enjoyed by prescription in, upon and throughout Gidley Common, whereof the said close in which, &c. was parcel, and from which it had been wrongfully inclosed. Replications traversing the "said common of turbary in, upon and throughout the said close, in which, &c. modo et formâ." Common of turbary had existed and had been exercised over Gidley Common generally; but with respect to the spot in question, before it was inclosed, the jury found that within living memory it had not been capable of growing turf for fuel, or anything in the nature of turf: Held, that under the issues raised, the exercise of the right over the common generally was admissible evidence, from which it might have been inferred that the original presumed grant extended to the locus in quo, and that the defendants were not tied down to show an actual exercise of the right over the particular spot, but that such inference could not be made when it appeared in effect that from time immemorial it had been impossible to exercise the right over the locus in quo. *Peardon v. Underhill*, 20 Law J. (N. S.) Q. B. 133.

**TRIAL BY RECORD.**—Upon an issue of nul tiel record, the court refused to give judgment, where the dies datus clause was omitted from the record. *Aylward v. Garrett*, 1 Q. B. P. 750.

**TROVER.**—*Conversion.*—A. having lawfully received certain bills of exchange from B., a trader, C. came to him, and stating that he was acting on the part of Messrs. Y. & Co., creditors of B., demanded the bills from A., and upon his refusal, said that B. was about to be made a bankrupt, that the bills must be given up, and that if they were not, A. would be compelled to give them up by the commissioner, and the expense would cost A. 200*l.*, and the commissioner would be very angry. A. was at the time ill in bed, and being greatly alarmed, gave up the bills: Held, that this was no conversion by C., as trespass would not have been maintainable for the taking under these circumstances. It appeared, however, that afterwards and before C. had handed the bills to his principals, he was informed that the plaintiff was entitled to the bills, and possession of them was demanded on behalf of the plaintiff, but notwithstanding this, he delivered them to Messrs. Y. & Co.: Held, that this was a conversion. *Powell v. Hoyland*, 20 Law J. (N. S.) Exch. 82.

**USE AND OCCUPATION.**—*Evidence of.*—C. having mortgaged a piece of land to the plaintiff, the defendants, a railway company, afterwards occupied it by laying their rails upon it, and being subsequently called upon by the plaintiff for compensation, negotiated with him in respect thereof. The plaintiff had never been in possession of the land, but gave notice of the mortgage to the defendants, and then brought an action for use and occupation. The judge directed the jury that the plaintiff was in a condition to waive the trespass in respect of the occupation of the land by the railway company, and to bring an action for use and occupation: Held, first, that there was evidence for the jury of the defendants having held the land on the terms of paying for it; secondly, that the plaintiff being a mortgagee out of possession, and not having entered upon the land previously to the trespass, nor having a judgment by default or a verdict in ejectment in his favour, was not entitled to maintain an action of trespass against the defendants. *Quære*, supposing the plaintiff to have been in possession of the land, and the defendants to have trespassed thereon and occupied it to his exclusion for some time, whether he would be entitled to recover for use and occupation, on the principle that he might waive the trespass and recover in assumpsit. *Turner v. Cameron's Coalbrook Steam, Coal and Swansea and Loughor Railway Company*, 20 Law J. (N. S.) Exch. 71.

**VARIANCE.**—*Special finding on record*—3 & 4 Will. 4, c. 42, s. 24.—A plea of set-off stated that the plaintiffs authorized one G. W., trading as G. W. & Co., to sell the goods, for the price of which the action was brought, as and for the proper goods of him G. W., and that he did so sell them, and that G. W. was indebted to the defendant, &c. The evidence was, that the plaintiff authorized G. W. to sell the goods as and for the goods of G. W. & Co., which firm

consisted of G. W. & L. S.: Held, that this was a material variance. The jury having found the facts as above according to the evidence, and that finding having been indorsed upon the record, Held, that the court could not give judgment for the defendant "according to the very right and justice of the case," by section 24 of 3 & 4 Will. 4, c. 42, that power only being given to the court in the case of variances which they shall think immaterial to the merits of the case. *Addington v. Magan*, 20 Law J. (N. S.) C. B. 82.

**VENUE.**—The plaintiff laid the venue in London, believing that he could give material evidence there. The defendant having changed it to the country where the cause of action arose, the court allowed the plaintiff before plea pleaded to amend the declaration by changing the venue to a county in which the plaintiff could undertake to give material evidence. The venue as thus amended is regarded as the original venue, quoad the defendant's right to change it upon the common affidavit. *Coleman v. Foster*, 1 Q. B. P. 753.

**WASTE.**—*Tenant for life—Tenantable repair.*—A testator devised to A. for life a house and other real estate, "he committing no manner of waste and keeping the premises in good and tenantable repair." In July, 1837, A. entered into possession, and in November, 1844, the house was totally destroyed by an accidental fire. In 1845 A. was found lunatic by inquisition, and the lunacy was dated from the 1st of October, 1843. Upon petition in lunacy of the remaindermen, who were also committees of the person and estate, Held, that the lunatic's estate was liable under the terms of the condition to reinstate the house; and reference was directed as to what amount ought to be expended in rebuilding, and out of what fund the expense should be paid, with liberty to the next of kin to take a case to law upon the construction of the condition. *In re Skingley, a lunatic*, 20 Law J. (N. S.) Chanc. 142.

**WITNESS.**—1. *Action for expenses.*—A party served with a subpoena in a civil action receiving a sum of money therewith, and making no further demand, may maintain an action against the party on whose behalf he has been subpoenaed for additional expenses incurred by him in attending the trial, but not for loss of time. *Pell v. Daubney*, 20 Law J. (N. S.) Exch. 44.

2. *Commission for the examination of witnesses—Costs.*—Under a commission issued forth for the examination of witnesses, both the plaintiff and the defendant examined witnesses: Held, that the defendant was liable to pay his proportion of the expenses of the execution of the commission. *Grove v. Young*, 20 Law J. (N. S.) Chanc. 167.

**WRIT OR SUMMONS.**—*Evidence of—Date of.*—Where a cause alone is referred, and the costs of the cause and of the reference are to abide the event, the costs of the reference are costs of the cause and follow its event. The defendant's costs under the 11 & 13 Vict. c. 106, s. 86, are to be deducted from the debt or damages recovered by the plaintiff, and not from the debtor's damages and the plaintiff's costs added together. Upon an application by defendant under the

12 & 13 Vict. c. 106, s. 86, for his costs, the date of the commencement of the action is sufficiently shown by the statement of the writ of summons in the issue delivered by the plaintiff, without any express averment to that effect upon the affidavits. *Deere v. Kirkhouse*, 1 Q. B. P. 783.

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## CRIMINAL AND MAGISTRATES' CASES.

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CONTAINED IN

20 Law J. (N. S.) parts 2, 3, 4.

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**CONSTABLE.**—*Shooting thief.*—A constable is not justified in shooting at a man whom he has seen stealing wood growing in a copse (which, if a first offence, is only a misdemeanour), although the constable has no means of arresting the man without firing, and although the stealing the wood in the particular instance amounted to felony, by reason of the man having been previously convicted several times for similar offences, under statute 7 & 8 Geo. 4, c. 29, s. 39, these convictions being unknown to the constable at the time. *Reg. v. Dadson*, 20 Law J. (N. S.) M. C. 57.

**FALSE PRETENCES.**—*Indictment—Allegation—False pretences made to J. B. and others—Variance—Surplusage.*—An indictment charged the prisoner with attempting, by false pretences made to J. B. and others, to defraud the said J. B. and others of certain goods, the property of the said J. B. and others. On the trial it was proved that the prisoner made the false pretences set forth in the indictment to J. B. only, with intent to defraud J. B. and others, his partners, of property belonging to their firm: Held, that there was no variance between the indictment and proof, as the words “and others,” in the allegation that the false pretence was made to “J. B. and others,” might be rejected as surplusage. *Reg. v. Kealey*, 20 Law J. (N. S.) M. C. 57.

**FORGERY.**—*Warrant and order for the payment of money.*—The prisoner forged, and delivered as genuine to B., who owed money to A., a letter purporting to be written by A. and addressed to B., in which, after setting out the amount due from B., A. was made to say, “Sir. I hope you will excuse me sending for such a trifle,” &c., “but I am obliged to hunt after every shilling:” Held, that the document

was a forged "warrant" for the payment of money within the meaning of the statute 11 Geo. 4 & 1 Will. 4, c. 66, s. 3. *Semble*, that it was also a forged "order" for the payment of money. *Reg. v. Dawson*, 20 Law J. (N. S.) M. C. 102.

**MANDAMUS TO CHAPELWARDENS.**—*Money borrowed—Consent of vestry—Re-payment out of rates—Township not a distinct parish.*—The township of B. formed part of the parish of W., but it maintained its own poor, and from time immemorial it had chapelwardens and a chapel, in which divine service and the sacraments of the church had been performed. In 1727, for the first time, a separate burial ground for the township was consecrated, in which the rite of burial had since regularly taken place. The repairs of the chapel had always been defrayed by rates raised within the township; and the vestry books of B. showed that several payments had been made to the churchwardens of W., but it did not appear that they were contributions towards the repair of the parish church. On the 30th of June, 1825, it was resolved, by a majority of the vestry of B., duly convened for that purpose, that an offer of 550*l.* from the "Society for Promoting the Enlargement of Churches and Chapels" should be accepted, and that the chapel should be enlarged, any deficiency in the expense to be made up by the sale of certain pews, and by rates under the acts of parliament. It was also resolved to petition the Commissioners for Building New Churches to erect a new church in the township free of expense to the inhabitants. On the 29th of November, 1827, the then chapelwardens duly executed a deed charging the chapel rates of the township with 600*l.* and interest, borrowed for the purpose of enlarging and rebuilding the chapel, a part of which had been paid off: Held, first, that B. was not in itself a parish within the meaning of the 58 Geo. 3, c. 45, s. 59; secondly, that the resolution of the 30th of June did not contain a sufficient consent of the vestry to the borrowing the 600*l.* upon the security of the rates within the same section, and, therefore, that a mandamus under the 58 Geo. 3, c. 45, to compel the defendants to pay off the arrears of that amount out of the rates, could not be supported. *Reg. v. Bilston (Chapelwardens of)*, 20 Law J. (N. S.) M. C. 63.

**MISDEMEANOUR AT COMMON LAW.**—*Conspiring to procure the defilement of a girl.*—A conspiracy to procure by false pretences, false representations, and other fraudulent means, a young girl to have illicit carnal connection with a man, is a misdemeanour at common law. *Reg. v. Mears*, 20 Law J. (N. S.) M. C. 59.

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## E Q U I T Y.

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Comprising the Equity Cases contained in the following Reports :—

12 Beavan, part 2. 1 Simons, part 1. 2 Macnaughten & Gordon, part 2. 3 Macnaughten & Gordon, part 1.	6 Railway and Canal Cases, part 2. 20 Law Journal (N. S.) part 2, 3, 4. 6 Moore, part 1.
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**AMENDMENT.**—*67th & 68th Orders of May, 1845.*—The sole defendant to a bill put in his answer. The bill was afterwards amended, and an answer put in to the amended bill. The plaintiff, within four weeks from the time that the answer was to be deemed sufficient, obtained an order from the Master for leave to amend, without the production of the affidavit mentioned in the 68th Order of May, 1845: Held, that the order was regular. *Masterman v. Midland Great Western Railway Company*, 20 L. J. (N. S.) Chanc. 43.

**ANSWER.**—*Insufficiency—Defendant—Privileged communications.*—A defendant admitted that he had in his possession documents relating to the matters in the bill, but refused to set forth a list of them, because they had been procured by his solicitor since the institution of the suit and for the purpose of his defence to it; and the same were, as he was advised and insisted, confidential communications: Held, that the allegation relative to the documents did not justify the defendant's refusal to set forth a list of them, and therefore that his answer was insufficient. *Balguy v. Broadhurst*, 1 Sim. 111.

**ASSETS.**—*Administration of.*—A testator had mortgaged his estate S. By his will he directed his debts, other than the mortgage, to be paid out of a specified part of his personal estate; he recited his intention of forthwith paying off a great part of the mortgage debt, and he directed that "the balance" of such mortgage should be paid by sale of timber on the S. estate. He made no bequest of his general personal estate: Held, that the mortgage was payable, first, out of the general personal estate; secondly, out of the descended real estate; and, thirdly, out of the timber money. A testator gave several life annuities, one of which was (expressed in the alternative) either 10*l.* a year or 5*l.* and a tenement (part of the N. estate); and he charged them all on the N. estate: Held, that all the annuities were charged exclusively on that estate. *Lomax v. Lomax*, 12 Beav. 285.



**CLAIM.—Parties—Residuary legatee.**—Some of the residuary legatees under a will may file a claim against the executors, without making the other residuary legatees parties, but the others ought to be summoned before the Master. *Watson v. Young*, 1 Sim. 114.

**COMPANY.—8 Vict. c. 18.**—The words “injuriously affected” in the 68th section of the Lands Clauses Consolidation Act (8 Vict. c. 18) comprehend cases of injury independent of taking land, and are not limited to damage sustained by persons whose lands or a part of whose lands are taken, used or directly interfered with, and the right to compensation extends to and may be asserted in respect of consequential damage. A lessee of premises not required for the purpose of a railway, served a notice and claim upon the company for a certain amount of compensation under the 68th section of the Lands Clauses Consolidation Act, the alleged injuries resulted from the dust and dirt occasioned by the works of the railway, from the temporary diversion of a footpath which passed along the premises of the claimant, and from the stoppage of a lane along which he claimed to be entitled to a right of way to the back of his premises. The company filed their bill, and obtained an injunction to restrain any further proceedings under the notice: Held, dissolving an injunction which had been granted by the Vice-Chancellor Wigram, that the claimant was entitled to proceed under the notice, and to have the amount of compensation assessed by a jury. By summoning a jury to assess the amount of compensation claimed by a party under the 68th section, the company is not precluded from questioning the right of the claimant to any compensation whatever. The jury had jurisdiction to construe the act upon the point whether the claim made is within its provisions. *East and West India Docks and Birmingham Junction Railway Company v. Gattke*, 3 M. & G. 155.

**2. Equity.**—A contractor having executed works for a railway company under two contracts, distinguished respectively as contract No. 1 and contract No. 3, brought an action against the company for the works executed under contract No. 1. The company filed a bill to restrain this action, alleging that the plaintiff’s demand depended on the result of complicated accounts, the company being entitled to various items of set-off, and that the account under contract No. 1 was so blended with that under contract No. 3, that what was due to the contractor could not be ascertained without taking both accounts. The contractor, by his answer, denied any complication in the accounts, or that the accounts were blended; he admitted the receipt of various sums in payment of works done under each of the contracts, and also of a large sum which, not being appropriated by the company, he had appropriated partly to one contract partly to the other; he also showed that the several heads of set-off were free from all uncertainty; he then stated that there was work done, the amount of which had not been ascertained, and other matters in respect of which he had claims on the company: Held, on appeal from an order of the Master of the Rolls granting an injunction, first, that, taking into account the explanations given in the answer, there would be no

difficulty in the company proving at law the claims of set-off under contract No. 1, and that no case for equitable interference was established on this ground; secondly, that before the contractor could recover anything under contract No. 1, he would be obliged to prove that he had a demand, exclusive of that contract, which justified his appropriation of that part of the sum received from the company which he had not appropriated to contract No. 1, that thus the accounts under contract No. 3 would have to be taken, and that in this way the accounts of the two contracts were blended; thirdly, that it being equally possible to take at law, with justice to both parties, the accounts under contract No. 3 as those under contract No. 1, the blending of the two accounts formed no reason for withdrawing the case from the jurisdiction of a court of law; fourthly, that the other claims set up by the contractor in his answer were such as could not be properly decided in the action, and that therefore the injunction granted was proper; fifthly, that the delay of the company in filing their bill was no ground for refusing to interfere in a case where it was clear that the court of law could not possibly deal with the subject-matter. The authorities show that there are many cases in which a court of equity will entertain jurisdiction in matters of account where, if the party making the claim had proceeded at law, the court would not, if applied to for that purpose, withdraw the matter from the legal jurisdiction. *South-Western Railway Company v. Brogden*, 3 M. & G. 8.

**CONDITION.—Legacy.**—Testator gave a legacy in trust for his daughter for life, remainder in trust for her children who should attain twenty-one, remainder in trust for two of his sons absolutely; and he gave the residue of his personal estate to his other children. By a codicil he declared that, finding that his daughter intended to become a nun, he revoked the bequest, in the event of her carrying her intention into effect, and excluded her from all reversionary advantages from his will. The daughter became a nun: Held, that the condition annexed by the codicil was a lawful one; and that, though the bequest in favour of the daughter was merely revoked, and there was no gift over on breach of the condition, her interest under the bequest ceased on her becoming a nun. *Dickson, Ex parte*, 1 Sim. 37.

**COPYRIGHT.—Injunction—Alien.**—A foreigner, resident temporarily in England, published in England a work for the first time. A bookseller, being in the course of selling, pirated copies of this work: Held, that the foreigner was entitled to the usual injunction to restrain the bookseller from selling them. *Ollendorff v. Black*, 20 Law. J. (N. S.) Chanc. 165.

**DEBTOR AND CREDITOR.**—A judgment entered up in 1845 against a beneficed clergyman for a debt, was duly registered: Held, that under the 1 & 2 Vict. c. 110, s. 13, it was a charge upon his benefice, and that the creditor was entitled to have a receiver of the profits of the benefice appointed. *Hawkins v. Gathercole*, 1 Sim. 63.

**DESIGNS COPYRIGHT ACT (5 & 6 VICT. c. 100).**—Whether, in the condition of copyright mentioned in the 4th section of the Designs Copyright Act (5 & 6 Vict. c. 100), that the design has before publication been registered, the term publication is limited to publication after the design has been embodied and introduced into some fabric, *quære*. A party is entitled to move to dissolve an injunction, if, from ambiguity in its terms, he may under any construction of the order be prejudicially affected. It is the duty of a party asking for an injunction to bring under the notice of the court all facts material to the determination of his right to that injunction, and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward. Thus, where a plaintiff obtained an ex parte injunction on the facts stated in the bill, but other facts came out in the defendant's answer, raising a question of law on which the right of the plaintiff to the injunction depended: Held, that the omission of the plaintiff to bring the facts under the notice of the court was of itself a sufficient ground for dissolving the injunction: principles on which the court acts on an application for an injunction to restrain a party from prosecuting a legal right. *Dalglish v. Jarvie*, 2 M. & G. 231.

**DETERMINING COSTS OF SUIT AFTER COMPROMISE.**—Parties compromised the subject-matter of the suit without providing for the costs: Held, that the cause could not be afterwards heard, for the purpose of determining the costs alone, and it was struck out of the paper. *Whalley v. Lord Suffield*, 12 Beav. 402.

**DEVISE.**—1. *Construction.*—A testator devised to J. S. “all those my three messuages, with the gardens, close of land, and all other my real estate whatsoever, situate at Little Heath, in the parish of F., now in the occupation of myself, A. and B. At the date of the will, and at the death of the testator, he was possessed of three messuages with gardens, and a close of land at Little Heath, which were in the occupation of himself, A. and B. He had also the reversion in a house and garden situate at Little Heath, which was in the occupation of C., who was entitled to it for life. Besides these he had no other property in the parish of F.: Held, that the house and garden in the occupation of C. passed under the general devise to J. S. Words of description following a general devise will not be construed as restrictive, where the effect of doing so would be to render the general devise inoperative, and where they may be rejected as a false demonstration. *Doe d. Campton v. Carpenter*, 20 Law J. (N. S.) Q. B. 70.

2. *Construction—Estate tail.*—A testator devised estates to trustees and their heirs, to the use of C. E. for life, to and for her sole and separate use, and independent of any husband whom she might marry, and her receipt (notwithstanding her coverture) to be a good discharge for the rents, &c. thereof, with remainder to the same trustees to preserve contingent remainders, with remainders “to the use of the heirs male of the body of C. E., lawfully to be begotten, who shall live to attain the age of twenty-one years, and to his heirs

and assigns for ever; but in default of such heirs male, or, there being such, he or they should die before he or either of them should attain the age of twenty-one years without lawful issue," then to the use of M. E. for life, precisely in the same form, and with exactly similar remainders: Held, that if the trustees took the legal estate at all they took it throughout the devise to C. E. and the heirs male of her body, in order to protect the interests of M. E. Held, also, that the words "heirs male of the body of C. E." must have their technical meaning, and that the words of description "who shall live to attain the age of twenty-one years" must be rejected as inconsistent with the general intention of the testator, and that consequently C. E. took an estate in tail male. *Toller v. Attwood*, 20 Law J. (N. S.) Q. B. 40.

3. *Construction—What property passes.*—A testator, purporting to dispose of "all the rest, residue and remainder of his estates, wheresoever and whatsoever," devised to his son D. H. "all those two cottages or tenements, the one occupied by my son, John Hubbard, and the other occupied by my granddaughter, together with all the appurtenances thereto belonging." At the date of the will, and death of the testator, a room originally part of a cottage (but which had several years before the making of the will been partitioned off from the rest of the building, and had a separate entrance) was occupied by John Hubbard as a separate dwelling, together with a hovel, part of the testator's property. The rest of the building, from which the room so occupied by John Hubbard had been taken, was in the separate occupation of the devisee D. H. There was also a room, originally part of another cottage, but from which it had been similarly partitioned off, which at the date of the will and the death of the testator was occupied by his granddaughter as a separate dwelling, together with an adjoining pantry. The rest of the building, from which the room so occupied by the granddaughter had been separated, was in the separate occupation of W. H. as a distinct dwelling. There was also at the same dates a building occupied as a separate dwelling by J. Weston, which was part of the testator's property. All these five dwellings had originally consisted of two cottages only, which had been subdivided as before stated, and were copyhold, to which the testator had, prior to the date of his will, but subsequent to some of the separations before mentioned, been admitted by the description of "all those two customary or copyhold messuages, cottages or tenements." In ejectment by the heir-at-law to recover the portions of the property other than those in the actual occupation of John Hubbard and the granddaughter: Held, by Lord Campbell, C. J., Patteson, J., and Wightman, J., that the rooms occupied by John Hubbard and the granddaughter respectively fulfilled the terms of the devise, and that consequently these rooms only, and not the whole of the cottages of which they had formerly been part, passed to the devisee; that the maxim, *falsa demonstratio non nocet*, applies only where the words of the devise, independently of the *falsa demonstratio*, are sufficient of themselves to describe the property intended to pass; and that therefore the words, "in the

occupation of John Hubbard and of my granddaughter," could not be rejected. Also, that the question put to a witness who had made the will, "What did the testator say about the two cottages?" was improper, as leading to an answer which would be inadmissible in evidence. Held, by Erle, J., that the whole of the two cottages passed under the devise to D. H., and that any declaration of the testator indicating that he spoke of his copyhold property by the description of the two cottages with their appurtenances, would be admissible to explain the latent ambiguity raised by the evidence in the cause, and that if the question was confined to such declaration it might be properly asked. *Doe d. Hubbard v. Hubbard*, 20 Law J. (N. S.) Q. B. 61.

5. *Remoteness*.—Although where a fee is given by a vested limitation, a remainder upon it must be an executory devise, and if it be too remote this and all subsequent remainders are void; yet if a fee be limited in contingency, and the estate is given over upon a contingency divesting the fee, if the fee so limited never vests the gift over takes effect as a contingent remainder. A testator gave real property to his daughter Elizabeth for life, and after her decease to such of her children, if a son or sons, who should live to attain the age of twenty-three years, and if a daughter or daughters who should live to the age of twenty-one years, their respective heirs and assigns, as tenants in common; and in case all the children of his said daughter Elizabeth should die, if a son or sons under the age of twenty-three years, or if a daughter or daughters under the age of twenty-one years, or if she had none, then the testator gave the said premises unto his son John and his daughters Sarah and Anne, for their respective lives; and upon the decease of his said son and two last named daughters, he gave the share of such of them so dying unto his or her children, if a son or sons living to attain the age of twenty-three years, and if a daughter or daughters living to attain the age of twenty-one years, his, her and their heirs and assigns. And in case of the death of his said son, or of either of his said two last-mentioned daughters, without leaving a child, if a son that should live to attain the age of twenty-three years, or if a daughter who should live to attain the age of twenty-one years, he gave the part and parts such children or child would be entitled to as aforesaid unto the child or children of his said son and two last-mentioned daughters having issue, if a son or sons living to the age of twenty-three years, and if a daughter or daughters living to attain the age of twenty-one years, if two of his said last named children had such children, to them, his or her heirs and assigns, as taking in equal shares from his or her father or mother, his, her or their heirs and assigns, and if only one of them his said son and two last mentioned daughters should leave issue that lived, if a son or sons to the age of twenty-three years, or if a daughter or daughters to attain the age of twenty-one years, then he gave the whole of such premises unto such issue, if more than one in equal shares, their respective heirs and assigns, and if only one, to such one, his or her heirs and assigns, at the ages aforesaid. All the children of the testator named in the will sur-



vived him. Elizabeth died, never having had a child; Anne survived Elizabeth, and died, never having had a child; Sarah died, leaving seven children, all of whom attained the prescribed ages; John had two children who attained the prescribed ages in his lifetime: Held, that in the events which happened the limitation subsequent to the death of Elizabeth without issue took effect by way of contingent remainder, supported by her life estate and vesting immediately on its determination, and that upon the death of Anne without issue each of the children of John took one-twelfth of the property originally devised to Elizabeth: Held, also, that the gift over took effect upon the death of Anne without ever having had any issue, equally as upon her having children who did not live to attain the prescribed ages. *Doe d. Evers v. Challis*, 20 Law J. (N. S.) Q. B. 113.

**EFFECT OF LORD CHANCELLOR'S SIGNATURE TO WARRANT OF COMMITTAL ISSUED UNDER ORDER OF SUBORDINATE JUDGE.**—The return of a writ of habeas corpus, moved for before the Lord Chancellor, showed that the party was committed to prison under the order of the Vice-Chancellor, but that the warrant for his committal had the letters "C. C." attached to it: Held, that the order for committal did not on that account cease to be the order of the Vice-Chancellor, and that therefore no question could be raised on the return to the writ touching the jurisdiction of the Lord Chancellor: Held, also, that all that the court can do on the return to a writ of habeas corpus is to see that the party is in custody under an order of some court having authority to commit. *Dimes, In re*, 3 M. & G. 4.

**ELECTION.**—A. B., an heir, elected to take against the will, and required the executors to complete a contract entered into by the testator for the purchase of a freehold estate, and it was conveyed to him. He nevertheless received great benefits under the will: Held, that the parties disappointed by the election had no lien on the estate for the amount received, but that they were entitled to prove against the estate of A. B. for the whole amount received by him under the will. *Greenwood v. Penny*, 12 Beav. 403.

**ENCUMBERED ESTATES ACT (IRELAND).**—Whether the Master of the Rolls has jurisdiction to enforce the orders of the commissioners for the sale of encumbered estates in Ireland? *quære*. *Scott, In re, Barton, Ex parte*, 12 Beav. 361.

**EQUITY.**—1. Principles on which the court deals with settled accounts in reference to granting relief either by a decree to surcharge and falsify or by a decree to take an open account. In a case where the accounting party was the solicitor or agent of the party sought to be charged, and it appeared that an item of 600*l.* was inserted for professional charges in the account which it was sought to treat as settled, no bill of costs having been delivered, and the 600*l.* exceeding by 75*l.* the sum really due: Held, that this was not such an error as could be set right by a decree to surcharge and falsify, but that the



account must be dealt with as an open account. An entry in the diary of a solicitor's clerk who had become lunatic not allowed to be read in evidence of a matter concerning which it was not the duty of the clerk to have made such entry. *Coleman v. Mellersh*, 2 M. & G. 309.

2. A. and B. entered into a joint adventure for the purchase of goods to be shipped to China, to be there sold, and the proceeds of the sale invested in a homeward cargo. A. was to render himself liable for the payment of the goods purchased, and B. was to supply A. with a share of the money by a fixed time, so as to enable A. to meet this liability. At the time fixed A. applied to B. for the money, but B. failed to supply it. In consequence of this, and after some negotiation on the subject, A. offered to allow B. to withdraw from the adventure altogether, and this offer was ultimately accepted. Down to the time when A. applied to B. for the money, A. had communicated to B. all the information which he possessed relative to the adventure and to its chances of success, which then appeared very doubtful; but while the negotiation was going on A. received two letters from his correspondent in China, through whom the business was managed, the contents of which he did not communicate to B.: Held, in a suit impeaching the arrangement by which B. gave up his share of the adventure, that, considering the relative situation of the parties, there was no obligation on the part of A. to communicate to B. the letters in question, and that there being no proof of misrepresentation by A. the arrangement could not be set aside merely on the ground of the non-communication of the letters. *M' Lure v. Ripley*, 2 M. & G. 274.

**EXCEPTIONS.**—Exceptions for insufficiency will be overruled, if they vary, in a material particular, from the form of the interrogatory, as where the interrogatory is in the present tense and the exception is in the past. *Brunswick, Duke of, v. Cambridge, Duke of*, 12 Beav. 279.

**FRAUD.**—A railway contractor, on the completion of the works, brought an action against the company to recover the balance. By an order of court, all matters in difference were referred to arbitration, with full powers; and the court was empowered to refer back the award from time to time. The award was made in July, 1848, and in January, 1850, the company filed this bill, alleging fraud in the performance of the works, practised in collusion with their engineer and discovered since the award, and seeking to set aside the award, and have the accounts taken. A general demurrer was allowed, on the ground that the matter was already before another jurisdiction competent to reconsider the matter and decide all questions. *The Londonderry and Enniskillen Railway Company v. Leeshman*, 12 Beav. 423.

**GRAMMAR SCHOOL.**—*Master—Removal.*—By a grant of King Edward the Sixth, the College House in Ludlow and divers estates were vested in the bailiffs, burgesses and commonalty (who, under the Municipal Corporation Act, took the name of the mayor,

aldermen and burgesses) of the borough of Ludlow, to continue out of the rents, issues and profits the grammar school in Ludlow, which was to be kept by one master and one usher. In 1838 the Court of Chancery appointed new trustees of the charity estates; and in 1848 a scheme was settled by the court for the management of the charity, and it provided "that the trustees should have authority from time to time, upon such grounds as they should in their discretion in the due exercise and execution of the powers and trusts reposed in them deem just, to remove the master, usher, &c. from their or his office." The trustees referred to the powers, and upon inquiry, and after several meetings, they passed a resolution to remove the master from his office, which they confirmed. Upon an application from the master to restrain the trustees from enforcing the resolution, held, that the word "trust" in the scheme superadded to the word "power" was to keep in view that it was a trust, for the execution of which the court was providing; that the word "trusts," especially when considered with reference to the direction to reserve the statement of the grounds of removal, had the effect of restricting the large meaning which might otherwise be given to the word "discretion;" that the regulation did not confer upon the trustees an arbitrary power to dismiss the master, upon any ground which they might deem just, free from any control of this court; that the trustees are not the only and absolute judges of the sufficiency of the grounds of removal; that the trustees not having instituted any inquiry in the presence of the master, which might have afforded him the means of explanation and defence, the court, without determining the right or propriety of the conduct of the trustees, granted an injunction to restrain them from enforcing the resolution of removal. *Willis v. Childe*, 20 Law J. (N. S.) Chanc. 113.

**INTERPLEADING SUIT.**—*Supplemental bill*.—*Parties—Pleading.*—A defendant to an interpleading suit may after decree file a supplemental bill to bring a new party before the court, without making the other parties to the original suit parties to it. *Lyne v. Pennell*, 1 Sim. 113.

**LEASE.**—*Executors.*—A testator held long leaseholds, some as original lessee, and others as assignee. They were sold in the suit: Held, that the executors were entitled to be indemnified against the eventual breaches of the covenants, either by a retainer in court of a part of the assets, or by a security of the legatees to refund. A reference was in such case made to the Master to ascertain what liabilities the estate might be subject to in respect of the covenants, and what amount ought to be set apart with liberty to the legatees to propose a proper security. *Dobson v. Carpenter*, 12 Beav. 370.

**LEGATEE.**—By his will the testator bequeathed his residue between Ann Sarah Parker and ten other persons (naming them). Two of the legatees having died, the testator by a codicil gave the residue between eight persons (naming them) and Ann Sarah Parker, G. F. and Ann Parker. It appeared that Ann Sarah Parker and

Ann Parker were the same person: Held, that she was entitled to one-tenth, and not to two-elevenths of the residue. *Read v. Strangers*, 12 Beav. 323.

**LICENCE TO USE PATENT.**—The plaintiffs, the assignees of a patent, granted a licence to the defendant to use the patent upon the terms of his paying an annual rent of 2000*l.*, to be made up at the end of each year, and reserved to themselves the power of determining the licence in the event of default being made in payment of this rent. The defendant failed in paying the rent; but the plaintiffs notwithstanding for several years allowed the defendant to use the patent, and received from him a less annual sum than that stipulated. At length, however, they determined the licence, having subsequently to the expiration of the previous year received from the defendant payments on the footing of the reduced rent: Held, that by so doing the plaintiffs had elected not to treat the previous breach as a forfeiture of the licence, and that consequently they were not entitled to an injunction restraining the defendant from using the patent. *Warwick v. Hooper*, 3 M. & G. 60.

**LUNACY.**—On the petition of the committee of the person and estate of a lunatic, reference directed to inquire as to the expediency of raising a fund for his maintenance by sale of his reversionary interest in realty. *Burbidge, Thomas In re*, 3 M. & G. 1.

**MORTGAGOR AND MORTGAGEE.**—A. mortgaged his freehold and copyhold estates and some drainage bonds, and by the same deed his daughters mortgaged their freehold and copyhold estates to B., to secure 6000*l.* lent by B. to A.; and the deed declared that, without prejudice to any of the rights or remedies of B., his heirs, executors, &c. as between A., his heirs, executors, &c. on the one hand, and the daughters and their heirs, executors, &c. on the other hand, B., his heirs, executors, &c. should be primarily liable to the payment of the 6000*l.*; and that his freehold and copyhold estates therein comprised should be primarily liable to answer and make good the 6000*l.* Six years afterwards A. mortgaged his freehold and copyhold estates comprised in the prior mortgage, and also the drainage bonds to B., to secure 700*l.* lent to him by B.: Held, that B. was not entitled, as against A.'s daughters, to tack his second mortgage to the first, but that the daughters were entitled to redeem the first mortgage on payment of the 6000*l.* *Bowker v. Bull*, 1 Sim. 29.

**PARENT AND CHILD.**—*Will—Construction.*—Testator gave all his property to trustees in trust to pay an annuity to his wife, and subject to that payment to convey, assign or transfer all his property unto and equally between his children, when and as they severally attained twenty-one, and in the meantime to pay to his wife or otherwise apply the rents and proceeds of their respective shares for or towards their respective maintenance, education and advancement. But in case of the decease of any of the children under twenty-one, then upon trust to convey, assign or transfer the shares of such of them as should so die and the accumulations, if any, unto and equally

between such of them as should attain twenty-one. The testator's widow maintained and educated the children for several years, and advanced three of them out of the income received by her from the testator's property, exclusive of her annuity; and the income being more than sufficient for those purposes, a considerable surplus remained in her hands: Held, that the surplus belonged not to the children, but to the widow. *Browne v. Paull, Hoggins v. Paull*, 1 Sim. 92.

**PARTIES.**—*Redemption*—*Judgment creditor*.—A judgment creditor, whose judgment was registered pursuant both to the Registry Act for the West Riding of Yorkshire (5 & 6 Anne, c. 18) and 1 & 2 Vict. c. 110, filed a bill to redeem a prior mortgage of lands in the West Riding, and to foreclose the mortgagor. The mortgagor had confessed other judgments, and the conusees had registered them pursuant to the 1 & 2 Vict. c. 110, but not under the West Riding Act: Held, that those conusees were not necessary parties to the suit. *Johnson v. Holdsworth*, 1 Sim. 106.

**PARTNERS.**—A partner having excluded his co-partner, an injunction was granted to restrain him from obstructing or interfering with his co-partner in the exercise and enjoyment of his rights under the partnership articles. Upon a disagreement, one partner by letter proposed to the other either to retire or to refer to arbitration. The other partner in answer said he concurred in the retirement, but subject to a condition as to the taking the accounts: Held, that the partnership was not dissolved. *Hall v. Hall*, 12 Beav. 414.

**PERPETUAL INJUNCTION ON MOTION.**—*Practice*.—By consent an injunction was made perpetual upon motion. *Morrell v. Pearson*, 12 Beav. 284.

**PRACTICE.**—1. One of several defendants, by his answer, admitted the possession of documents, but by an affidavit subsequently filed stated that since his answer he had deposited them with one of his co-defendants. A motion for their production refused in the absence of the co-defendants. *Burbidge v. Robinson*, 2 M. & G. 244.

2. A receipt not having a proper stamp cannot be used as evidence of a matter collateral to the payment of the money. Thus, in a case where it was sought to prove an agreement for purchase by means of a receipt for the purchase-money, such receipt not being properly stamped: Held, that the evidence could not be admitted. *Evans v. Prothero*, 2 M. & G. 319.

3. *Dismissal*.—After an answer was to be deemed sufficient, the plaintiff filed exceptions to it for impertinence: Held, that the pendency of those exceptions did not prevent the defendant from moving to dismiss the bill for want of prosecution. *Stuart v. Lloyd*, 1 Sim. 56.

**PRODUCTION.**—Case and opinion submitted and taken by trustees, in contemplation of the litigation, held privileged as against the cestuis que trust. *Brown v. Oakshot*, 12 Beav. 252.

**PRODUCTION OF DOCUMENTS.**—*Privileged communications.*—The plaintiffs, who were assignees of a bankrupt firm at Teneriffe, filed their bill against the defendants, three brothers, one of whom managed the business of the Teneriffe firm, for an account of certain remittances forwarded by the manager of the Teneriffe firm to his brother, as agent in London. The defendant, the London agent, set up as a defence certain proceedings in the Lord Mayor's Court, instituted by the third defendant as executor of his father, under which the money in the hands of the agent of the Teneriffe firm were attached for a debt alleged to be due to the estate of the father. Upon motion for production of documents, it was held, that letters which had passed between the London agent and his solicitors with reference to the litigation in this suit were privileged; that letters which had passed between such solicitors and the attorney acting in the proceedings in the Lord Mayor's Court were also privileged; but that the letters from the defendant, the manager of the Teneriffe firm, to the co-defendant, the agent in London, for the purpose of being communicated to his solicitors, with a view to the litigation in this suit, were not privileged. *Goodall v. Little*, 20 Law J. (N. S.) Chanc. 132.

**PUBLIC COMPANY.**—Property in the possession of a receiver appointed by the court in a suit, was in two instances seized by the sheriff under writs of *fi. fa.* issued by judgment creditors of the defendant: Held, that the sheriff was not warranted in making the seizures. On motions in the suit to commit the sheriff: Held, that the sheriff could not justify the seizures by questioning the propriety of the order under which the receiver was appointed; and on the submission of the sheriff an order was made in each case for him to withdraw from possession and to pay the costs, the court considering this order as sufficient under the circumstances for the maintenance of its jurisdiction; the court at the same time protected the sheriff against proceedings by the judgment creditor in one of the cases where the judgment creditor had been served with notice and appeared on the motion, but refused to make this addition to the order in the other case where the judgment creditor had not been served and was not present. It is an established rule, that it is not open to a party to question any order or process of the court by disobedience, and it is not inconsistent with this general rule, that the court, in administering punishment for disobedience to an order, will attend to all the facts of the case, and, amongst others, to the circumstances under which the order was made. *Russell v. East Anglian Railway Company*, 3 M. & G. 104.

**RAILWAY.**—*Lands Clauses Consolidation Act.*—Some property was mortgaged to the plaintiffs, who were not bound to receive their money until a future day. A railway company, with knowledge, treated with the mortgagor alone, and, not agreeing, paid into court, to the credit of the mortgagor, the amount of compensation, but made no provision for the compensation to the mortgagees under

the 8 & 9 Vict. c. 18, s. 114. The company then took possession and commenced pulling down the building; the court restrained the company from proceeding until the value of the mortgagee's interest had been ascertained and paid or secured. *Rankeen v. East and West India Docks and Birmingham Junction Railway Company*, 12 Beav. 298.

**RECEIVER AGAINST PARTY IN POSSESSION.**—After a verdict upon an issue *devisavit vel non*, the court appointed a receiver against the party to whom possession of estates had been given by the trustees of the legal estate under an order of this court, though an order *nisi* had been obtained for a new trial. *Bainbrigg v. Bainbrigg*, 20 Law J. (N. S.) Chanc. 139.

**STAYING SECOND SUIT UNTIL PAYMENT OF COSTS OF FIRST.**—Motion to stay proceedings in a second suit until payment by the plaintiff of the costs in the first, which had been dismissed, refused, it not appearing that the second bill could be produced by a fair amendment of the first. Cross costs in two suits ordered to be set off. *Budge v. Budge*, 12 Beav. 385.

**TAXATION.**—1. An *ex parte* order for the delivery of a bill of costs discharged with costs; the allegation of the professional employment being denied by the solicitor. *Eldridge, In re*, 12 Beav. 387.

2. Application by residuary legatee more than twelve months after payment for the taxation of a solicitor's bill against the executor refused, notwithstanding there had been some agreement between the legatee and solicitor, and that payment had afterwards been made behind the back of the legatee. Order for taxation, made upon affidavit of service, discharged with costs; the petition having misrepresented the case, and the real facts being found not to warrant the order. *Rees, In re*, 12 Beav. 256.

**VENDOR AND PURCHASER.**—A. B. became the purchaser of a mansionhouse and park, under conditions of sale which stated that the whole property was freehold, except eight acres, which were copyhold, but undistinguished, except as to not including any of the buildings. The abstract of title having been delivered, and discussions thereon having taken place which raised difficulties in the way of completing the purchase, a supplemental agreement was entered into, detailing what requisitions as to title, &c. should be complied with. Among these requisitions was one in the following words, "Declaration of identity of lands mentioned in deeds to those now sold": Held, on a bill filed by the vendor for specific performance, that the supplemental agreement was a substitution for the original contract, and that A. B. was not entitled to demand that the vendor should distinguish the freehold from the copyhold parts of the premises, so as to show that the latter did not include any of the buildings. *Dawson v. Brinckman*, 3 M. & G. 53.

**VOLUNTARY DEED.**—*Debtor and creditor.*—A. conveyed



all his property to three of his creditors, in trust to pay the debts due from him to themselves and to his other creditors who should execute the deed. The trustees and some of the other creditors executed the deed, but with notice that B. had a demand upon A. and was about to enforce it; afterwards B. filed a bill against A. and the trustees to set aside the deed, on the ground that it was a mere voluntary deed of agency. The court, at the hearing, dismissed the bill with costs. *Mackinnon v. Stewart*, 1 Sim. 76.

**WILL.**—The word “estate” when used in a will is genus generalissimum, and will, of its own proper force, without any proof aliunde of an intention to aid the construction, carry realty as well as personalty, and is not to be confined or restrained to personalty only, unless there is a clear intent expressed in other parts of the will, to be gathered, either from the whole will, or from the way in which the word is used in the particular part of the will where the contested use of it arises. *Mayor of Hamilton v. Hodson*, 6 Moore, 76.

2. *Suspicious testamentary disposition.*—Where a testamentary disposition is propounded under circumstances of suspicion, as where the party propounding it was the drawer and was benefited by it, and it was executed at a time when the testator was of doubtful capacity, without any evidence of instruction previously given or knowledge of its contents, the party propounding it must prove that the testator knew and approved of the contents of the instrument. A codicil, which varied the bequests contained in the will of the testator to the benefit of the drawer, and executed at a time when the testator was supposed to be dying, in the absence of proof of the knowledge by the testator of its contents, pronounced against. Proof of the actual reading over of the instrument to the testator before execution is not necessary. *Mitchel v. Thomas*, 6 Moore, 137.

3. *Construction—Heir-at-law.*—A testator devised and bequeathed all his real and personal estate to trustees, upon trust (after certain life estates) for the heir-at-law of his family then living, whosoever the same might be: Held, that the next of kin of the testator, according to the Statutes of Distribution, had no interest under the above gift. *Tetlow v. Ashton*, 20 Law J. (N. S.) Chanc. 53.

**WINDING-UP ACT.**—By a deed of settlement of a joint-stock company, executors were not to be proprietors: Held, nevertheless, that they were contributories, and might maintain a petition to wind up. Where a company is insolvent, and has been getting worse, it is no answer to an application to wind it up to say that the difficulties are temporary, and that there is hope of more prosperous times. *Norwich Yarn Company, In re*, 12 Beav. 366.

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## ECCLESIASTICAL.

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 20 Law J. (N. S.) parts 2, 3.
 

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**CLERGY.**—*Non-residence—Summons to show cause—Monition—Order to reside—Sequestration—Right of clergyman to be heard before sequestration.*—A writ of sequestration issued under the stat. 1 & 2 Vict. c. 106, to compel a clergyman to reside on his benefice, is not merely in the nature of a distress to compel residence, but is also a penal proceeding against him, as it is one step towards the forfeiture of the benefice. The bishop therefore ought to give the clergyman an opportunity of being heard before directing the sequestration. If, in obedience to a monition issued by the bishop, a clergyman goes into residence and again ceases to reside, the bishop may serve him with an order to reside, but if that order be disobeyed the bishop is not justified in directing a sequestration at once, and the sequestration will be void unless before issuing it he gives the clergyman an opportunity of rebutting the supposed facts, or of offering lawful excuse for his disobedience to the order to reside. *Semble*, that a summons to show cause should precede the issuing of the monition, as it has a penal character; and that the sequestration should recite the delinquency on account of which it is issued, and also the bishop's adjudication on the same. *Bonaker v. Evans*, 20 Law J. (N. S.) Q. B. 137.

**ECCLESIASTICAL LAW.**—*Clergy—Union of benefices—Non-residence—1 & 2 Vict. c. 106—Sequestration—Jurisdiction of bishop.*—The union of two or more benefices cannot be effected without the assent of the patrons. *Quære*, whether an union of two benefices during the life of the incumbent is valid. A., being perpetual curate of W. S., a benefice with cure of souls, was subsequently presented, instituted and inducted to a rectory, C., also with cure of souls, both benefices being in the diocese of N. and fifty miles apart from each other. Concurrently with his presentation and institution to the latter benefice, the bishop of N., by an instrument under his episcopal seal, addressed to A. as perpetual curate of W. S. and rector of C., which recited that good causes had been alleged, and allowed, united, annexed and incorporated the rectory with the perpetual curacy during the incumbency of A. in the latter, and so long as he should be perpetual curate there, and no longer, by the bishop's ordinary authority, provided that A. should keep a sufficient curate to instruct and teach the people of the parish in which he should not reside: Held, that the legal effect of this instrument was not to create an union of the two benefices in the proper sense of the term,

so that residence in the one produced a non-residence in the other of the two benefices, and that the bishop had jurisdiction, under the 1 & 2 Vict. c. 106, to appoint a curate for the parish in which A. did not de facto reside, and to enforce payment of the stipend assigned to him under sect. 83 of that act. A monition was issued by the bishop, which recited that a complaint had been made by the curate that arrears of stipend were due to him, which A. had wilfully neglected and refused to pay; and that A. and the curate having appeared before him, the bishop heard summarily the said differences, and that the said complaint was duly proved before him, and that he adjudged the same to be true; it then admonished and required A. to pay the said arrears. Default being made in payment a sequestration issued, under which the fruits of the benefice were seized to satisfy the arrears of the stipend: Held, that A. could not, after the sequestration issued, object that he had not been guilty of a refusal to pay the stipend, or that he had no notice of the curate being appointed by the bishop. *Daniel v. Morton*, 20 Law J. (N. S.) Q. B. 98.

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## ADMIRALTY.

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Containing the Cases in 3 Admiralty Reports, part 1.

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**AGENT OF LLOYD'S.—*Salvor*.**—An agent at Lloyd's is not entitled to sue as a salvor, for the mere hiring and engaging of men to assist a vessel in distress. Claim of alleged salvor dismissed with costs. *The Lively*, 3 Adm. Rep. 64.

**BOND.—*Registrar's report*.**—Question as to the costs of a reference to the registrar and merchants. Where a bond is pronounced for, and being referred to the registrar and merchants, large deductions are made in the registrar's report, the party setting up the bond will be liable to the costs of the reference. *Semble*, the main consideration in the judgment of the court will be the amount of the sum deducted in proportion to the sum which is claimed. *The Catherine*, 3 Adm. Rep. 1.

**BOTTOMRY.**—A vessel carried into a foreign port by a mutinous crew, with the master dispossessed and in irons, the expenses incurred by a party employed by the British Vice-consul to investigate into the mutiny, and re-invest the master in his command, allowed by the court to be a good foundation for a bottomry transaction, although no mention was made of a bottomry bond in the outset of the inquiry, and the bond was taken from the master on the eve of the vessel's sailing from the port. *The Gauntlet*, 3 Adm. Rep. 82.

**COLLISION.**—1. Where a vessel having been run down, subsequently becomes unmanageable and gets upon a sand bank and is lost, the presumption of law is, that her eventual loss is attributable to the effects of the collision, and not to the mismanagement of the persons on board. *The Mellona*, 3 Adm. Rep. 7.

2. *Look-out station.*—In a collision in the river Mersey, between a steam tug and a ferry boat: Held, by the Trinity Masters, that the proper station for the master or look-out man in such steamer is the bridge between the paddle-boxes. *The Wirrall*, 3 Adm. Rep. 56.

**DAMAGE.**—1. *Collision.*—The value of a vessel, condemned in a cause of damage by collision, is the existing value of the vessel at the time or immediately prior to the collision. Claim of the owners of a damaging vessel, to have their liability reduced to the value of their ship after the collision, overruled. *The Mary Caroline*, 3 Adm. Rep. 101.

2. *Missing stays.*—Defence of a vessel in a cause of damage, that from the proximity of the two vessels, and the fact of the damaging vessel missing stays, in consequence of a sudden squall of wind, the collision was inevitable, not sustained. *Semble*, if a vessel in close proximity to another vessel is put in stays and misses, it is the duty of the persons on board to square the mainyard and to let the vessel pay off. *The Kingston-by-Sea*, 3 Adm. Rep. 152.

3. *Moiety of.*—The owners of a foreign vessel, which was run down by a British ship, brought an action for damages in the Admiralty Court, and a cross action was also entered against the foreigners by the British owners. The foreign owners being resident abroad and declining to give an appearance in the cross action, the cross action was discontinued, and the cause was heard upon the original action alone. The Trinity Masters being of opinion that both vessels were in fault, the court decreed the damage to be equally divided between them. This sentence was appealed and affirmed by the Privy Council and the cause was remitted. A motion was now made on behalf of the British owners, that the Registrar and merchants should be directed to ascertain the amount of the damage sustained by the British ship, and deduct a moiety of that damage from the compensation awarded to the foreign owners. The court rejected the motion, but withheld the payment of the sum claimed by the foreign owner, until he consented to a deduction of a moiety of the damage sustained by the British ship. *The Seringapatam*, 3 Adm. Rep. 38.

**DEMURRAGE.**—*Collision.*—Where a vessel is sunk in collision, and compensation is awarded by the Court of Admiralty to the full value of the vessel as for a total loss, the plaintiff will not be entitled to recover anything in the nature of a demurrage for loss of the employment of his vessel or his own earnings in consequence of the collision. *The Columbus*, 3 Adm. Rep. 158.

**JURISDICTION OF ADMIRALTY COURT.**—1. *Receiver of droits.*—Construction of the stat. 9 & 10 Vict. ss. 19 & 23. The Court of Admiralty has no jurisdiction to enforce a bond, given to the

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**LIGHT AT NIGHT.**—*Running down*.—A vessel lying at anchor, in a track frequented by other ships, is bound at night to exhibit an efficient light. The owners of a vessel so lying at anchor, and run into by a vessel under sail: Held to have been in fault, in omitting to exhibit such light. *The Victoria*, 3 Adm. Rep. 49.

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**SALVAGE.**—1. *Boats used for, without owner's presence*.—The owners of boats rendering a salvage service, not having been personally present at the time the service is rendered, are not entitled to sue as salvors. Some remuneration, however, is due to them for the use of their boats, by way of equitable compensation. *The Charlotte*, 3 Adm. Rep. 68.

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